Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

ROBERT STEWART, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

LYNN ABRAHAM, DISTRICT ATTORNEY OF PHILADELPHIA COUNTY, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY; DISTRICT ATTORNEY'S OFFICE OF PHILADELPHIA COUNTY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court's decision in Gerstein v. Pugh, 420 U.S. 103 (1975) requires a judicial determination of probable cause for a re-arrest and detention of a defendant in criminal proceedings where a judicial officer has determined at a preliminary hearing that there is no probable cause for continued prosecution of the defendant.

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Robert Stewart respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is reported at 275 F.3d 220. A copy of the Opinion is included at Appendix A at 1a. The Order Denying the Petition for Rehearing En Banc is included at Appendix B at 51a. The Memorandum Opinion of the United States District Court for the Eastern District of Pennsylvania and accompanying Order is included in Appendix C at 53a.

STATEMENT OF JURISDICTION

The Opinion of the United States Court of Appeals for the Third Circuit was issued on December 26, 2001. The Petition for Re-hearing En Banc was denied on January 28, 2002. This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISION

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

1. Petitioner's Arrest, Discharge and Re-Arrest

Petitioner Robert Stewart was arrested on March 24, 2000 by Philadelphia Police and charged in a criminal complaint date with aggravated assault. At the preliminary hearing, after hearing the testimony submitted by the District Attorney, the Municipal Court judge found no probable cause for the felony charge of aggravated assault. The case was remanded for trial in Municipal Court on the misdemeanor offense of simple assault. A. 5a.[1] Pursuant to a new re-arrest policy adopted by the District Attorney, as Mr. Stewart was leaving the courtroom, he was arrested and taken into custody on the very charge that the Municipal Court judge had just dismissed. At his preliminary arraignment following the re-arrest, the District Attorney filed the *identical* complaint (based on the *identical* evidence) that had been filed on March 24, 2000. The Bail Commissioner imposed new bail and petitioner was incarcerated for a period of two additional weeks.

2. Arraignment and Preliminary Hearing Procedure in Philadelphia County

In Philadelphia County, persons arrested and charged in a felony complaint are held in custody (for periods up to and exceeding 24 hours) pending a preliminary arraignment before a Bail Commissioner. The Bail Commissioner makes a probable cause determination based solely on the criminal complaint filed by the District Attorney. A defendant in a

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[1] In Philadelphia County, misdemeanor charges are heard in the first instance in the Municipal Court of Philadelphia County.

felony case is entitled to a preliminary hearing (held before a judge of the Philadelphia Municipal Court) within 3-10 days of his arrest. Rule 540, Pa. R. Crim. P. At the preliminary hearing, the following dispositions may occur:

1. After hearing evidence that establishes a prima facie case, the Municipal Court judge may order the accused "held for court" on one or more felony charges and the matter is then sent to trial in the Court of Common Pleas.

2. After hearing evidence, the Municipal Court judge may "remand" the case for trial in Municipal Court. This occurs when a judge determines that the prosecution has established probable cause as to misdemeanor offenses only.

3. After hearing evidence, the Municipal Court judge may determine that there is no prima facie case as to any charge, and order that the matter be dismissed and the defendant discharged.

4. Where no evidence is presented and there have been multiple continuances and good cause is not shown, the Municipal Court judge has the authority to discharge the matter.

For many years, re-arrests of defendants in Philadelphia County following dismissal of their criminal charges at a preliminary hearing were effectuated by the filing by the District Attorney of a criminal complaint and affidavit

of probable cause in the Court of Common Pleas. If the averments in these filings established probable cause, a Common Pleas judge would approve the re-arrest, and a new preliminary hearing would be scheduled. See, e.g., Commonwealth ex rel. Fitzpatrick v. Mirarchi, 392 A.2d 1346 (Pa. 1978).

3. The District Attorney's New Re-Arrest Policy

On April 17, 2000, the District Attorney invoked a new procedure for re-arrests: where a Municipal Court judge dismisses a felony charge because of lack of evidence or a failure to prosecute, the District Attorney effectuates a re-arrest by arresting the defendant as he leaves the courtroom. Under this policy, petitioner Stewart and all members of the class are subjected to custodial detention awaiting a preliminary arraignment.

The District Attorney has claimed that the new procedure is authorized by Rule 544, Pa. R. Crim. P. that provides in pertinent part:

> (A) When charges are dismissed or withdrawn at or prior to a preliminary hearing, the attorney for the Commonwealth may reinstitute the charges by approving, in writing, the refiling of a complaint with the issuing authority who dismissed or permitted the withdrawal of the charges.

4. Procedural History of this Case

This action was filed by petitioner Robert Stewart on behalf of himself and all others similarly situated. The district court held an evidentiary hearing on the matter on June 27,

2000 and granted the requests for class certification and an injunction by Order and Opinion of July 17, 2000. In a comprehensive Opinion, the district court determined that the policy of arresting and detaining members of the class, without judicial authorization, immediately after the criminal charges have been dismissed at a preliminary hearing, violated the Fourth Amendment. The court stated:

> This constitutional safeguard is designed to protect persons against unreasonable seizures, that is, against arbitrary arrests. It circumscribes within narrow limits the power of the police or prosecutor to hold someone for a crime unless a judicial officer, who is not an arm of law enforcement, finds under the evidence presented that the accused probably committed the crime in issue. Unless this important threshold is met, a person's liberty should not be infringed.
>
> . . .
>
> In advance of the initial arrest, the judicial voice, as a practical matter, often cannot be heard. See Gerstein, 420 U.S. at 113. However, once the judge's pronouncement has taken place, the situation has changed dramatically. It has changed dramatically because there is now a judicial finding that insufficient evidence exists to establish that the arrestee probably committed the crime in question. At that point, the District Attorney's power is constrained. Unless and until a judicial finding of probable cause is made thereafter by the same judge or another judge

> of equal or higher rank, the District Attorney and the police simply cannot re-arrest the accused on the same charge. Otherwise, the protections of the Fourth Amendment requiring a judicial determination will be rendered nugatory.

A. 70a-72a.

On December 26, 2001, a panel of the Third Circuit, over the dissent of Judge McKee, reversed the Fourth Amendment ruling. A Petition for Re-hearing En Banc was denied on January 28, 2002.

REASONS FOR GRANTING THE WRIT

The Decision Below That There is No Requirement for a Prior Judicial Determination of Probable Cause for the Re-Arrest and Detention of an Individual After a Court Has Determined that There was No Probable Cause for Continued Prosecution Contravenes the Fourth Amendment

In Gerstein v. Pugh, 420 U.S. 103 (1975), this Court made the "practical compromise," id. at 113, by which the deprivation of liberty caused by a warrantless arrest is counter-balanced by a prompt post-arrest judicial determination of probable cause. Gerstein v. Pugh is rendered a nullity where, as here, following a judicial determination of no probable cause, a re-arrest based on the same evidence is effectuated without judicial authorization. The decision below permits the prosecutor to countermand the very judicial determination required by Gerstein v. Pugh and

in so doing eviscerates fundamental Fourth Amendment protections.[2]

A. The panel majority held that the warrrantless re-arrest policy does not offend the Fourth Amendment on the theory that a finding of lack of probable cause at a preliminary hearing does not necessarily mean that there is no probable cause for a re-arrest. The court suggested that "the database available to the prosecutor is different from that available to the judge determining the *prima facie* case issue," and that the Commonwealth will "frequently . . . gain additional knowledge of incriminating evidence within minutes or hours after the preliminary hearing concludes." A. 18a. But, as Judge McKee explains, "[it] is not at all clear what this data base is, where it came, from, or what it contains. The only thing about this 'database' is that there is no mention of it in the record." A. 21a. Indeed, in this case, the District Attorney did not allege any new evidence in the re-arrest complaint.

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[2] The importance of the decision by a detached magistrate to the protection of liberty and privacy has been repeatedly recognized by the Supreme Court. In Johnson v. United States, 333 U.S. 10, 13-14 (1948), the Court stated:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

Further, even if additional evidence was presented, Gerstein v. Pugh would be a dead letter if the re-arrest could be effectuated without prior judicial approval. We do not contest the power to re-arrest; rather, once it has been judicially determined that probable cause does not exist, the Gerstein v. Pugh "compromise" requires judicial determination that there is probable cause for a re-arrest. Indeed, in Gerstein v. Pugh, this Court specifically rejected the argument that "prosecutorial judgment standing alone meets the requirement of the Fourth Amendment." Id. at 117.

Finally, this case demonstrates the imaginary nature of the supposed database. The Commonwealth filed a criminal complaint against petitioner charging aggravated assault. At the preliminary hearing, after the sole Commonwealth witness testified concerning the charge, the court determined that the evidence supported the charge of simple, but not aggravated assault. Within seconds, petitioner was re-arrested on *the identical complaint that had just been dismissed.* There were no new facts or new evidence (from a "database" or elsewhere). The panel's hypothesis that the prosecutor must have had additional information is fully rebutted by the record: a judge had determined lack of probable cause and an assistant district attorney, without asserting the existence of additional evidence, ordered a warrantless re-arrest.

The court below also stated that there is nothing in the Constitution that "requires a state to give collateral effect to a preliminary hearing finding so as to preclude the state from reinitiating the prosecution in the normal manner." A. 18a. Respectfully, this is a non-sequitur. No one claims that the ruling by the preliminary hearing judge establishes any kind of collateral or other bar to re-prosecution. The issue is quite different: once a judge, exercising her authority pursuant to

Gerstein v. Pugh, has found no probable cause, can the prosecutor order a re-arrest without prior judicial approval. As we have made clear, to permit this procedure is to eviscerate the central holding of Gerstein v. Pugh. Judge McKee put the issue in its proper perspective:

> The injunction does not preclude prosecutions: it precludes unauthorized detentions. It prevents the District Attorney from detaining a defendant pending a second preliminary hearing where a judge has dismissed the felony charges holding a defendant in custody. It also prevents the prosecutor's assessment of probable cause from outweighing and reversing a judicial determination of probable cause.

A. 26a-27a.

The federal circuit courts have consistently interpreted the Fourth Amendment to prevent police from overriding judicial determinations regarding probable cause. See, e.g., United States v. Brown, 251 F.3d 286, 292 (1st Cir. 2001)(police may not make no-knock entry where court has refused request for no-knock authority). Historically, the courts have required prior judicial approval or a grand jury indictment for continuation of detention found to be lacking in probable cause. See, e.g., Morse v. United States, 267 U.S. 80, 85 (1925)(discharge at a preliminary hearing on a removal petition does not bar a trial "in the court to which the indictment is returned"); United States ex rel. Rutz v. Levy, 268 U.S. 390, 393 (1925)(discharge at preliminary hearing did not bar subsequent prosecution, initiated by an arrest warrant issued by the Court). The decision of the court below stands alone in permitting a warrantless re-arrest.

Similarly, Rule 5.1(b), F.R.Crim.P., which codifes the authority of the federal prosecutor to institute "a subsequent prosecution for the same offense [that had been discharged]," in conjunction with related rules of criminal procedure, requires that probable cause must be established to the satisfaction of a judge or grand jury prior to the re-filing of charges. The Advisory Committee Notes to Rule 5.1(b) make clear that the authorization to institute "a subsequent prosecution for the same offense" should be by a new complaint (or, by indictment). Under Rule 3, a Complaint must be submitted under oath setting forth the essential facts constituting the offense and under Rule 4, the Magistrate Judge must find probable cause before issuing an arrest warrant or summons upon the Complaint.

B. The suggestion by the court below that the "prima facie" standard at preliminary hearings in Pennsylvania is more demanding than a showing of probable cause is both clearly erroneous and irrelevant to the Fourth Amendment issue. First, even if there was a difference in the prima facie and probable cause standards judicial authorization for a re-arrest would still be required. Gerstein v. Pugh was intended to protect an accused from prosecution and detention where there is no probable cause to hold the case for trial. In Pennsylvania, dismissal of charges at a preliminary hearing is mandated where insufficient evidence exists to hold the defendant for trial. Whether cast as a lack of probable cause or lack of a prima facie case, the reason for the discharge, protection from "unlawful arrest and detention," Commonwealth v. McBride, 595 A.2d at 589, 591 (Pa. 1991) is identical to the Fourth Amendment right of an individual to be free "from unfounded interference with liberty" provided by the judgment of a neutral magistrate. See Gerstein, 420 U.S. at 114 ("consequences of prolonged

detention may be more serious than the interference occasioned by arrest").

In its most recent and definitive opinion on this issue, Commonwealth v. McBride, 595 A.2d 589 (a case not even cited by the circuit court), the Pennsylvania Supreme Court ruled that the "sole function [of the judge at preliminary hearing] is to determine whether probable cause exists to require an accused to stand trial on the charges . . ." Id. at 592 (emphasis added). It is no accident of language that the terminology used by the Supreme Court in McBride and other cases, that the preliminary hearing protects an "individual's right against unlawful arrest and detention," is deeply rooted in Fourth Amendment probable cause jurisprudence.

The Superior Court of Pennsylvania has also definitively ruled that the standards of prima facie case and probable cause are identical. In Commonwealth v. Sebek, 716 A.2d 1266, 1269 (Pa. Super. 1998), the court stated:

> [I]t is clear that the concept of establishing a prima facie case is inextricably tied to a showing of probable cause. That is, for the Commonwealth to establish a prima facie case they need to show probable cause that the accused committed the offense. Therefore, a finding by the magistrate that the Commonwealth did not establish probable cause that the appellant committed the violations for which he was charged is the same as a finding that the Commonwealth did not establish a prima facie case. Thus, contrary to appellant's assertion, there is no legal distinction to the choice of phraseology that the magistrate may have employed in

dismissing the charges against him. (emphasis added)

See also, Commonwealth v. Marti, 779 A.2d 1177, 1180 (Pa. Super. 2001)(prima facie case requires Commonwealth to show "probable cause" that defendant committed crime). Thus, the appellate courts in Pennsylvania have authoritatively found the standards to be identical.[3]

CONCLUSION

The judicial determination that there was insufficient evidence to hold the petitioner for trial on a felony charge is a judgment by a neutral magistrate that directly implicates the accused's right not to be subject to continued prosecution and detention. Once this judicial judgment is made, a re-arrest without judicial authorization would render Gerstein v. Pugh meaningless. This Court should grant the Petition for Writ of Certiorari.

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[3] The court below relies on Commonwealth v. Cartegena, 393 A.2d 350, 354 (Pa. 1978), but there the plurality authorized a re-arrest pursuant to the very procedure that petitioner requests in this case. A re-arrest was approved upon submission of a "more detailed complaint *and another arrest warrant* . . . [which] were presented to a judge of the Court of Common Pleas . . . who *signed the documents.*" (emphasis added). In Commonwealth v. Days, 718 A.2d 797 (Pa. Super. 1998), the court addressed a different issue–whether there was probable cause stated in a search warrant. But even in this context, the court stated that the duty of a preliminary hearing judge is to decide whether there is a "substantial basis for concluding that probable cause exist[s]." Id.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-2358

[Filed December 26, 2001]

ROBERT STEWART, on behalf of himself and all others similarly situated	)
v.	)
LYNNE ABRAHAM, District Attorney of Philadelphia County, individually and in her official capacity; DISTRICT ATTORNEY'S OFFICE OF PHILADELPHIA COUNTY Appellants	)

On Appeal from
United States District Court
for the Eastern District of Pennsylvania
Civil Action No. 00-cv-02425
District Judge: Hon. Harvey Bartle III

JUDGES:
Before: ROTH, McKEE and STAPLETON, *Circuit Judges*

OPINION

STAPLETON, *Circuit Judge*:

This civil rights action mounts a Fourth Amendment challenge to a practice of the Philadelphia District Attorney's Office which the parties have labeled "the re-arrest policy."

I.

Rule 502[1] of the Pennsylvania Rules of Criminal Procedure provides that a criminal proceeding may "be instituted by . . . an arrest without a warrant" if there is probable cause to believe that the subject has committed a felony. Pa. R. Crim. P. 502. In the case of a warrantless arrest, a complaint is filed and a "preliminary arraignment" is held "without unnecessary delay." Pa. R. Crim. P. 518(A). A reference in the commentary of the *Rules to County of Riverside v. McLaughlin*, 500 U.S. 44, 114 L. Ed. 2d 49, 111 S. Ct. 1661 (1991), makes clear that under ordinary circumstances the preliminary arraignment must be held within 48 hours. *See* Pa. R. Crim. P. 540(C). At the preliminary arraignment, a neutral magistrate "makes a determination of probable cause." Pa. R. Crim. P. 540(C), 42 Pa. Cons. Stat. §540(C). If he determines that probable cause does not exist, the subject is discharged. *Id.* Otherwise, bail is set and a date for a preliminary hearing is fixed no "less

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[1] On March 1, 2000, the Supreme Court of Pennsylvania signed an order authorizing the reorganization and renumbering of the Pennsylvania Rules of Criminal Procedure. This order became effective on April 1, 2001. We use the current numbering system throughout this opinion.

than 3 nor more than 10 days after the preliminary arraignment." Pa. R. Crim. P. 540(E)(1). If the Commonwealth presents a "*prima facie* case" at the preliminary hearing, the subject is held over for trial. Pa. R. Crim. P. 543. If "a *prima facie* case of the defendant's guilt is not established at the preliminary hearing, and no . . . continuance" is granted, the charge is dismissed and the subject is discharged. Pa. R. Crim. P. 542(D). Under Rule 544(A), "when charges are dismissed . . . at . . . a preliminary hearing, the attorney for the Commonwealth may reinstitute the charges by approving, in writing, the refiling of a complaint." Pa. R. Crim. P. 544(A).

Under the challenged rearrest policy, the District Attorney, from time to time when she concludes she has probable cause, reinitiates criminal charges that have been dismissed at a preliminary hearing by rearresting the subject and refiling a complaint pursuant to the authority of Rules 518 and 544. The person arrested is then held to await a new preliminary arraignment within 48 hours. Cash or property posted on the initial arrest is applied against the bail set at that arraignment.[2] This reinitiation of a criminal proceeding occurs without a judicial determination that the District Attorney has probable cause to believe that the subject has committed a felony. Because no *prima facie* case has been presented at the

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[2] The Pennsylvania Rules of Criminal Procedure do not specifically address the issue posed by the imposition of bail following re-arrest. However, the record indicates that in May 2000, the Municipal Court of Philadelphia, with the agreement and cooperation of the District Attorney's Office and the Defender Association, instituted a policy permitting bail posted on an initial arrest to be credited to bail set as a result of a re-arrest.

preliminary hearing in such cases and because there has been no judicial finding of probable cause prior to the rearrest, rearrests pursuant to the District Attorney's policy are here challenged as unreasonable seizures under the Fourth Amendment.[3]

Plaintiff/Appellee Robert Stewart brought this §1983 action on behalf of himself and others similarly situated. The District Court granted class certification and enjoined the District Attorney from employing the rearrest policy. The certified class was defined as follows:

> All persons who have been or will in the future be subjected to the practice and policy of the . . . [Philadelphia] District Attorney of re-arresting, without judicial authorization, persons whose criminal charges have been dismissed by a Philadelphia Municipal Court Judge based on a determination that the Commonwealth had not established, by reason of lack of evidence or lack of prosecution, probable cause to hold the criminal case for trial.

The District Court's injunction prohibited the District Attorney from "ordering the re-arrest and detention, without judicial authorization, of any persons on any charge which has been dismissed by a Philadelphia Municipal Court judge at a

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[3] The District Attorney's rearrest policy is not challenged here as violative of Pennsylvania law and, accordingly, we assume for present purposes that it is consistent with that law.

preliminary hearing because of the failure of the Commonwealth . . . to establish probable cause or a prima facie case." This appeal followed. We will reverse.

II.

Stewart was arrested and charged with one count of the felony of aggravated assault, and with misdemeanor counts of simple assault, recklessly endangering another person, and possession of an instrument of crime. One day after his arrest, Stewart was preliminarily arraigned and released on bail. A preliminary hearing was subsequently held in Philadelphia Municipal Court. At the conclusion of that hearing, the presiding judge ruled that the Commonwealth had not presented a *prima facie* case against Stewart on the felony count. Accordingly, the judge dismissed the felony count of aggravated assault and scheduled Stewart's case for trial on the remaining misdemeanor counts only. The Assistant District Attorney who was prosecuting Stewart in the courtroom immediately reinitiated an identical felony charge of aggravated assault. The allegations of the new complaint were identical to those in the complaint that had just been dismissed. Police re-arrested Stewart on the "dismissed" charge, and detained him for another preliminary hearing. Because Stewart was not able to make the bail set at his second preliminary arraignment, he remained in jail for approximately two weeks until his second preliminary hearing was held. Stewart filed this civil rights action under 42 U.S.C. §1983 while he was in custody awaiting the second preliminary hearing.

III.

The District Attorney first argues that the District Court should have abstained from exercising its jurisdiction under the doctrine of *Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971). The District Court decided not to abstain, and we conclude that it did not abuse its discretion in doing so.

Younger was arrested under a state criminal statute which allegedly violated his right to free speech under the First and Fourteenth Amendments. While the state charges were still pending, Younger filed an action in federal court to enjoin his prosecution. The District Court agreed that the statute was void for vagueness and overbroad in violation of the First and Fourteenth Amendments and enjoined the District Attorney from enforcing it. *See id.* at 40. The Supreme Court reversed. It held, based on principles of equity and federalism, that a federal court should not enjoin a state criminal proceeding without a showing that the plaintiff would suffer irreparable injury "both great and immediate." *Id.* at 46 (quoting *Fenner v. Boykin*, 271 U.S. 240, 70 L. Ed. 927, 46 S. Ct. 492 (1926)). This standard cannot be met, the Court said, if "the threat to the plaintiff's federally protected rights . . . [can be addressed] by his defense against a single criminal prosecution." *Id.* at 46.

In *Younger*, the federal plaintiff requested that the District Court find unconstitutional the law under which the government was prosecuting him and thereby foreclose his prosecution. In this case, the equitable relief requested is not aimed at state prosecutions, but at the legality of the re-arrest policy and the pretrial detention of a class of criminal

defendants. The issues here raised could not have been raised in defense of Stewart's criminal prosecution, and the injunction sought would not bar his prosecution.

We conclude that the Court's application of *Younger* in *Gerstein v. Pugh*, 420 U.S. 103, 43 L. Ed. 2d 54, 95 S. Ct. 854 (1975), controls our resolution of the abstention issue here. The defendants in *Gerstein* were arrested pursuant to a prosecutor's information. Under applicable Florida rules and statutes, prosecutors could charge noncapital offenses by information without a preliminary hearing or leave of court. The Florida courts had previously held that the prosecutor's filing of an information "foreclosed the suspect's right to a preliminary hearing." *Id.* at 106.

Several arrestees detained under this procedure filed a class action against county officials in federal District Court alleging that they had "a constitutional right to a judicial hearing on the issue of probable cause and requesting declaratory and injunctive relief." *Id.* at 107. The State of Florida argued that Younger compelled abstention because federal action would interfere with state proceedings by requiring the state to grant prompt probable cause hearings contrary to the state's own rules and procedures. The Court unanimously rejected that argument. The Court stated:

> The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions[ ] [under] *Younger v. Harris*. The injunction was not directed at the state prosecutions as such, but only at the legality of the pretrial detention

> without a judicial hearing, an *issue that could not be raised in defense of the criminal prosecution*. The order to hold preliminary hearings could not prejudice the conduct of the trial on the merits.

Id. at 108 n.9 (citations omitted, emphasis added). We find the situation before us analogous to that before the Supreme Court in *Gerstein*.

We also find the Supreme Court's subsequent characterization of *Gerstein* to be helpful here. In *Moore v. Sims*, 442 U.S. 415, 60 L. Ed. 2d 994, 99 S. Ct. 2371 (1979), the Court distinguished *Gerstein* from the case before it on the following ground:

> The reliance on *Gerstein* is misplaced. That case involved a challenge to pretrial restraint on the basis of a prosecutor's information alone, without the benefit of a determination of probable cause by a judicial officer. This Court held that the District Court properly found that the action was not barred by *Younger* because the injunction was not addressed to a state proceeding and therefore would not interfere with the criminal prosecutions themselves. "The order to hold preliminary hearings could not prejudice the conduct of the trial on the merits."

442 U.S. at 431 (quoting *Gerstein*, 420 U.S. at 108 n.9). That is precisely the situation here.

The District Court properly exercised jurisdiction over this matter.

IV.

To obtain certification, Stewart was required to show that the purported class met the four prerequisites of Rule 23(a) and at least one of the elements of Rule 23(b). *See Baby Neal v. Casey*, 43 F.3d 48, 55 (3d Cir. 1994). Rule 23(a) states:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). The District Attorney argues that Stewart's claim fails to meet the (1) numerosity, (2) commonality, and (3) typicality elements required for class certification under Rule 23(a). She concedes that the named class representative will adequately represent the interest of absent class members as is required under Rule 23(a)(4).

Rule 23(b)(2) provides for class certification where the requirements of Rule 23(a) are satisfied and "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate

final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).

A. Numerosity

No minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met. *See* 5 James Wm. Moore et al., *Moore's Federal Practice* §23.22[3][a] (Matthew Bender 3d ed. 1999). Here, both parties concede that, prior to the injunction, the District Attorney had re-arrested 67 defendants under Rule 544 pursuant to the disputed policy. Forty-one of those defendants had been discharged for lack of evidence and the resulting failure to establish probable cause. The number of class members will increase further if the policy continues in force. Accordingly, plaintiffs satisfy the numerosity requirement of Rule 23(a).

B. Commonality

"The concepts of commonality and typicality are broadly defined and tend to merge. Both criteria seek to assure that the action can be practically and efficiently maintained and that the interests of the absentees will be fairly and adequately represented. Despite their similarity, however, commonality and typicality are distinct requirements under Rule 23." *Baby Neal v. Casey*, 43 F.3d at 56 (internal citations omitted). "The commonality requirement will be satisfied if the named plaintiffs share *at least one* question of fact or law with the grievances of the prospective class."*Id.* (emphasis added).

The District Attorney argues that circumstances among the potential class members vary to such an extent that there is no commonality. She reminds us that defendants can have their charges dismissed at the preliminary hearing for many different reasons. The District Attorney also argues that a discharge for a lack of prosecution, in which the charges are dismissed because the government cannot produce a necessary witness and the court does not grant a continuance, differs from a discharge for a lack of evidence, in which the government fails to make a *prima facie* case. She insists that these "dissimilar" situations cannot be included in the instant class certification.

However, this argument fails to recognize that, despite the differences that undoubtedly exist from case to case, common issues of law and fact predominate. The class is defined such that each class member had his/her criminal case discharged by a judicial officer and was then re-arrested based solely upon the exercise of prosecutorial discretion, without any judicial determination of probable cause for the arrest. The District Court specifically enjoined re-arrest of persons against whom charges have been dismissed at the preliminary hearing because of failure to establish probable cause or a *prima facie* case. Therefore, "at least one question of fact or law" is common to each member of this prospective class.

C. Typicality

The typicality inquiry centers on whether the interests of the named plaintiffs align with the interests of the absent members. *See* 5 James Wm. Moore et al., *Moore's Federal Practice* §23.24[1]; *Newton v. Merrill Lynch, Pearce, Fenner & Smith, Inc.*, 259 F.3d 154,183 (3d. Cir. 2001) ("The

typicality inquiry . . . centers on whether the named plaintiffs' individual circumstances are markedly different or . . . the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based.") (citation omitted). "Cases challenging the same unlawful conduct which affects both the named plaintiffs and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims." *Baby Neal*, 43 F.3d at 58 (citation omitted). "Factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the [absent] class members, and if it is based on the same legal theory." *Hoxworth v. Blinder, Robinson & Co., Inc.*, 980 F.2d 912, 923 (3d Cir. 1992) (quoting 1 Herbert B. Newberg, *Newberg on Class Actions* §3.15 at 168 (2d ed. 1985)). Here, Stewart challenges the District Attorney's re-arrest policy and the constitutionality of that policy is at the heart of each of the absent members claims.

D. Rule 23(b)(2)

Rule 23(b)(2) is designed primarily to authorize class action treatment for cases like the one before us that seek injunctive relief. *See Baby Neal*, 43 F.3d at 58. Moreover, it is generally recognized that civil rights actions seeking relief on behalf of classes like the putative class normally meet the requirements of Rule 23(b)(2). *See id.* at 59 ("The injunctive class provision was 'designed specifically for civil rights cases seeking broad declaratory or injunctive relief for a numerous and often unascertainable or amorphous class of persons.'") (citations omitted). Finally, *Baby Neal* teaches that courts should look to whether "the relief sought by the named

plaintiffs [will] benefit the entire class." *Id.* at 59. Here, Stewart seeks injunctive relief in a civil rights claim and the relief sought could benefit the entire class.

Thus, we conclude that the District Court did not abuse its discretion in certifying this litigation as a class action. Accordingly, we now turn to the merits of the dispute.

V.

The applicable Fourth Amendment law "represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime." *Gerstein*, 420 U.S. at 112. From the individual's perspective, that accommodation provides that he or she may not be arrested in the absence of probable cause and may not be detained for over 48 hours without a neutral magistrate's review of that probable cause determination. *See Gerstein,* 420 U.S. at 114; *County of Riverside*, 500 U.S. at 56. Conversely, from the state's perspective, that accommodation provides that a state may arrest and detain an individual without a warrant if it has probable cause and provides for review of the probable cause determination by a neutral party within 48 hours of the arrest. *Id.* It is the function of the reviewing neutral magistrate to determine "whether the facts available to the officers at the moment of the arrest would 'warrant a man of reasonable caution in the belief ' that an offense has been committed." *Beck v. Ohio*, 379 U.S. 89, 96, 13 L. Ed. 2d 142, 85 S. Ct. 223 (1964) (quoting *Carroll v. United States*, 267 U.S. 132, 162, 69 L. Ed. 543, 45 S. Ct. 280 (1925)).

The record does not establish that Stewart or any member of the class was deprived of anything that this

constitutional accommodation guarantees them. It does not establish that the officer initially arresting Stewart (or any member of the class) or the officer rearresting Stewart (or any member of the class) lacked information at the time of the arrest that would "warrant a man of reasonable caution in the belief that an offense had been committed." *Id.* Nor does the record establish that Stewart (or any member of the class) was detained for a total of more than 48 hours without a review of the probable cause determinations by a neutral magistrate. These facts should have ended the matter and mandated summary judgment in defendants' favor. The Pennsylvania law requiring probable cause for arrests and a preliminary arraignment within 48 hours satisfies all that the Fourth Amendment requires, and there is no reason to believe that law was not fully complied with here. *See Commonwealth v. Abdul-Salaam*, 544 Pa. 514, 678 A.2d 342, 347-48, n.10 (Pa. 1996) (noting that Pennsylvania's pretrial process up through the preliminary arraignment addresses the constitutional requirements of *Gerstein* and *County of Riverside*).[4]

What Stewart asks us to do is to deprive Pennsylvania of its right to reinitiate a criminal proceeding in accordance with a generally applicable process that is entirely consistent

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[4] Stewart's rearrest, of course, would have violated the Fourth Amendment had it been made without probable cause. The same would be true with respect to an arrest of any member of the class without probable cause. Stewart has not attempted to show, however, that the district attorney lacked probable cause at the time of his arrest or anyone else's. The record does not reveal, for example, what information was presented to the neutral magistrate at Stewart's second preliminary arraignment and was there found to constitute probable cause.

with the dictates of the applicable Fourth Amendment law. There is no precedent of which we are aware, however, for the proposition that the federal Constitution prohibits the reinitiation of a criminal proceeding in such a manner where double jeopardy has not attached and no pattern of prosecutorial harassment has been alleged.[5]

Stewart's argument is predicated on the proposition that the federal Constitution requires Pennsylvania to give preclusive effect to the disposition of a municipal judge at a preliminary hearing unless and until there is a finding of probable cause in a subsequent judicial proceeding. This novel proposition and the arguments advanced in support of it are unpersuasive.

Contrary to Stewart's repeated assertions, there is nothing inherently inconsistent between a finding that the Commonwealth has failed to establish a *prima facie* case at the preliminary hearing and the existence of probable cause for a second arrest.

First, it is not at all clear to us that the "probable cause" standard and the "*prima facie* case" standard under Pennsylvania law require the Commonwealth to provide the

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[5] As the commentary to Pa. R. Crim. P. 544 explains, the Pennsylvania "courts have held that the reinstitution [of a prosecution under that rule] may be barred [when] the Commonwealth has repeatedly rearrested the defendant in order to harass him . . . ." Pa. R. Crim. P. 544 cmt. (citing *Commonwealth v. Thorpe,* 549 Pa. 343, 701 A.2d 488 (Pa. 1997); *Commonwealth v. Shoop*, 420 Pa. Super. 606, 617 A.2d 351 (Pa. Super. 1992)). No pattern of harassment is alleged here.

same level of assurance that the subject has committed a crime. The different terms chosen to describe the Commonwealth's burden at the time of arrest and preliminary arraignment and its burden at the time of the preliminary hearings, suggest to us that *prima facie* case standard was intended to require different and greater assurance of guilt. "Probable cause," of course, speaks in terms of a probability while "*prima facie* case" has been defined by the Pennsylvania Supreme Court as evidence "such that if presented at the trial in court, *and accepted as true*, the judge would be warranted in letting the trial go to the jury." *Commonwealth v. Wojdak*, 502 Pa. 359, 466 A.2d 991, 996 (Pa. 1983) (emphasis in original) (citations omitted). Thus, while the Commonwealth need not convince the preliminary hearing judge of guilt beyond a reasonable doubt, it must nonetheless present admissible evidence at the preliminary hearing that would warrant a reasonable jury in finding each of the elements of the offense by that standard. *Id.* It is thus not surprising to find Pennsylvania cases recognizing that the standard of probable cause and the *prima facie* case standard are conceptually distinct. *See Commonwealth v. Cartegena,* 482 Pa. 6, 393 A.2d 350, 355 (Pa. 1978) (plurality opinion) (finding that probable cause had existed for the institution of criminal proceedings, though a *prima facie* case had not been established); *Commonwealth v. Days*, 718 A.2d 797, 800 (Pa. Super. 1998) (stating in the context of affirming that a magistrate properly determined that probable cause existed to issue a search warrant that "probable cause is based on a finding of probability, not a *prima facie* showing of criminal activity"); *Commonwealth v. Scott*, 279 Pa. Super. 8, 420 A.2d 717, 720 (Pa. Super. 1980) ("It would be unreasonable to require payment of costs every time the Commonwealth wanted to challenge a finding of lack of *prima facie* case

when there had not even been a hint of harassment or failure to show probable cause.").

Even if "probable cause" and "*prima facie* case" are coterminus standards, however, we would nevertheless conclude that there is nothing inherently inconsistent between a failure of the Commonwealth to establish a *prima facie* case at the preliminary hearing and the existence of probable cause for a second arrest. The database that the Commonwealth may consult in determining whether there is probable cause for a second arrest is different from, and more comprehensive than, the database to which consideration is limited at the preliminary hearing.

First, in determining whether there is probable cause for a second arrest the prosecutor is entitled to consider any information known to him that a reasonably prudent man might regard as reliable. *See McKibben v. Schmotzer*, 700 A.2d 484, 492 (Pa. 1997) (defining probable cause as "a reasonable ground or suspicion supported by circumstances sufficient to warrant an ordinarily prudent man in the same situation in believing that the party is guilty of the offense"). By way of contrast, the presiding judge at a preliminary hearing must find that the Commonwealth has not presented a *prima facie* case unless it has produced information *in legally admissible form* substantiating each element of the offense. *See Commonwealth ex rel Buchanan v. Verbovitz*, 525 Pa. 413, 581 A.2d 172, 174 (Pa. 1990) (holding that where the Commonwealth relied upon inadmissible hearsay to establish a *prima facie* case, it did not meet its burden of producing at the preliminary hearing "legally competent evidence to demonstrate the existence of facts which connect the accused to the crime charged").

Second, the database available to the prosecutor is different from that available to the judge determining the *prima facie* case issue because a *prima facie* case can exist only on the basis of legally admissible evidence presented in court at the time preliminary hearing, while probable cause can exist on the basis of all the reliable information known to the prosecution at the time of the second arrest. The District Attorney notes, for example, that the most frequent reason for a re-arrest is the failure of a witness to appear who the Commonwealth has reason to believe can provide important evidence of guilt. In such a situation, a determination that a *prima facie* case has not been presented is not inconsistent with the existence of probable cause for immediate re-arrest. Moreover, given that preliminary hearings are often held while the investigation of the crime is continuing, it will frequently be the case that the Commonwealth will gain additional knowledge of incriminating evidence within minutes or hours after the preliminary hearing concludes. The District Court's injunction bars the District Attorney from *ever* reinitiating charges without prior judicial approval, no matter how much additional incriminating information she learns in the course of her investigation.

More fundamentally, however, even if there were some necessary inconsistency between a finding that the Commonwealth failed to present a *prima facie* case at the preliminary hearing and the existence of probable cause for rearrest, we would still be unable to find anything in the United States Constitution that requires a state to give collateral effect to a preliminary hearing finding so as to preclude the state from reinitiating the prosecution in the normal manner. As the District Court concluded, traditional principles of *res judicata* would not appear to require that

collateral effect be given to a preliminary hearing disposition, [6] but even if that were not the case, Pennsylvania would be free, within the limits of due process, to fashion its own rules of preclusion.

In summary, Pennsylvania's requirement that a criminal prosecution may not go forward unless the state presents evidence constituting a *prima facie* case of guilt before a magistrate at the time of the preliminary hearing is not necessary to satisfy the requirements of the Fourth Amendment under *Gerstein* and *County of Riverside*. If Pennsylvania chooses to impose this additional requirement, there is, of course, no federal constitutional impediment to its doing so. Nor, of course, is there any constitutional mandate that it do so.

What Stewart asks us to do is to take a Pennsylvania hearing process that is not constitutionally required and fashion a federal constitutional rule giving collateral effect to the magistrate's ruling at that hearing so as to bar the state from exercising its right to arrest when it believes in good faith that it has probable cause. This proposed rule appears to be based solely on an appeal that respect be accorded the authority of the municipal judge who presides at the preliminary hearing. While Pennsylvania could, if it so chose, accord such respect to a judge's *prima facie* case ruling, we

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[6] *See Commonwealth v. Cartagena*, 482 Pa. 6, 393 A.2d 350 (Pa. 1978) (holding that rearrest was proper even though the same charge was dismissed at prior preliminary hearing).

find nothing in the United States Constitution that requires it to do so.[7]

VI.

The judgment of the District Court will be reversed, and this matter will be remanded for further proceedings consistent with this opinion.

CONCUR

McKEE, *Circuit Judge* concurring in part, and dissenting in part:

I join sections II, III, and IV of the majority opinion, however I disagree with the majority's conclusion that the District Attorney's implementation of Pa. R. Crim. P. 544 is constitutional.[1] I therefore dissent from section V of the majority opinion.

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[7] Given the early stage at which a preliminary hearing occurs and the fluid state of affairs that frequently exist at that stage, Pennsylvania's choice not to accord such respect to the *prima facie* case ruling is clearly not an unreasonable one.

[1] As the majority notes, The Supreme Court of Pennsylvania entered an order reorganizing and renumbering the Pennsylvania Rules of Criminal Procedure on Mach 1, 2000. Like my colleagues, I use the current numbering system throughout this dissent.

I.

Under Pa. R. Crim. P. 544, the Philadelphia District Attorney's Office has adopted a practice of re-arresting some defendants immediately after a Municipal Court Judge has discharged felony charges at a preliminary hearing. The discharges are based upon the judge's conclusion that the defendant's continued detention is not supported by probable cause. The re-arrests do not result from any additional evidence, or changed circumstances. An Assistant District Attorney merely restamps the same criminal complaint that was originally filed. The defendant is then immediately re-arrested on the same charges that have just been dismissed even though a judge has just ruled that the evidence offered in support of the those charges is insufficient to support them.[2] Rule 544 does not require this practice, nor can it

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[2] My colleagues suggest that the decision to re-arrest may have been based on additional information that the prosecutor learned from some "database" and that this information may not have been known when the judge discharged the felony charges. *See* Maj. Op. at 14 ("The database that the Commonwealth may consult in determining whether there is probable cause for a second arrest is different from and more comprehensive than, the database to which consideration is limited at the preliminary hearing."). It is not at all clear what this data base is, where it came from, or what it contains.

The only thing that is clear about this "database" is that there is no mention of it in the record, and that the prosecutor did not have time to consult any such "database" before Stewart was re-arrested. That re-arrest here occurred as soon as the judge dismissed the felony charges. Stewart was apparently arrested in the courtroom, and in front of the judge who had just ruled that there

legitimize this practice.

II. Applicable Rules of Criminal Procedure.

Under Pa. R. Crim. P. 518(A), a defendant in Philadelphia County who is charged in a complaint with a felony and arrested without a warrant is detained pending a preliminary arraignment. That preliminary arraignment usually occurs within 24 hours of the defendant's arrest. *See* Pa. R. Crim. P. 518(A). At the preliminary arraignment a Bail Commissioner, functioning as the "issuing authority," informs the defendant of his/her rights, including the right to counsel, and appoints counsel if necessary.[3] The defendant is

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was no probable cause to support his detention on those charges. Moreover, the District Attorney has not even attempted to justify this practice by relying on some unspecified database of additional information that would have supported the dismissed charges if the judge had only known about it.

[3] In 1984, the Pennsylvania General Assembly created the office of Bail Commissioner for the Philadelphia Municipal Court. *See* 42 Pa. Cons. Stat. Ann. §1123(a); *see also Murray v. Silberstein*, 882 F.2d 61, 62 (3d Cir. 1989) (noting creation of Bail Commissioner position by the Pennsylvania legislature). In 1994, former Rule 140 (now Rule 540) of the Pa. R. Crim. P. was amended to require the "issuing authority" at a preliminary arraignment to determine probable cause. Pa. R. Crim. P. 540(C). This amendment to Rule 140 was adopted in response to *County of Riverside v. McLaughlin*, 500 U.S. 44, 114 L. Ed. 2d 49, 111 S. Ct. 1661 (1991), wherein the Supreme Court held that a probable cause determination must generally be made within 48 hours of arrest. In Philadelphia County, the issuing authority is the bail

also given a copy of the criminal complaint that has been accepted for filing, Pa. R. Crim. P. 540(A), 520, 523 and unless a defendant who is represented by counsel waives a preliminary hearing, the Bail Commissioner/issuing authority must also set a date for a preliminary hearing before a Philadelphia Municipal Court judge. That date can be "no less than 3 nor more than 10 days after the preliminary arraignment." Pa. R. Crim. P. 540(E)(1).

If the Commonwealth is able to establish a *prima facie* case for a felony charge at the ensuing preliminary hearing, the Municipal Court Judge orders the defendant held for trial in the Court of Common Pleas on the felony charge(s). If the Municipal Court judge dismisses all felony charges due to lack of evidence or lack of prosecution so that only misdemeanor charges remain, the defendant is tried on those misdemeanor charges in Municipal Court. *See* Pa. R. Crim. P. 543(A), 1001(A). If the Municipal Court Judge at the preliminary hearing concludes that the Commonwealth has not established a *prima facie* case on any of the charges, the judge must discharge the defendant unless a continuance is granted pursuant to a request "supported by reasonable grounds." *See* Pa. R. Crim. P. 542(D).[4]

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commissioner.

[4] The majority notes that the District Attorney suggests that the most common reason defendants are immediately re-arrested at the preliminary hearing is because important witnesses fail to appear thus compromising the Commonwealth's ability to establish probable cause. *See* Maj. Op. at 15. However, that was not the case here. The prosecution presented all of the evidence against Stewart it wanted to, and a judge ruled that evidence insufficient to detain

Under the Rules of Criminal Procedure in effect in Pennsylvania before January 1, 2000, if a Municipal Court judge dismissed criminal charges at the preliminary hearing due to lack of evidence or lack of prosecution, the attorney for the Commonwealth could reinstitute charges by submitting a new criminal complaint and an affidavit of probable cause to a judge of the Court of Common Pleas. *See* Phila. Crim. R. 500(H). However, a warrant for the defendant's re-arrest would only issue if the court approved the submission. If the initial dismissal of charges in the Municipal Court was based

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him on felony charges.

Inasmuch as Rule 542(D) specifies that a prosecutor may request a continuance "supported by reasonable grounds," I fail to see why re-arrest and imprisonment rather than requesting a continuance is the favored response to a witnesses failure to appear. Requiring the prosecutor to request a continuance rather than automatically resorting to the expediency of detention places no burden whatsoever on the Commonwealth. It merely requires that the prosecutor offer an explanation for the witnesses failure to appear, and assumes that a judge will evaluate the adequacy of the explanation. This is no more than is required of lawyers in criminal and civil courtrooms all over this country everyday. Prosecutors in Philadelphia County are as able as the lawyers elsewhere, and I fail to see why the Assistant District Attorneys in Philadelphia are not required to request a continuance and offer an explanation for a witnesses failure to appear just like other lawyers are expected to. This would allow a judge to gauge the efforts that were made to produce the witness and also afford an opportunity for the judge to decide if bail should be continued or reduced if the continuance is granted. Under the current practice a defendant can be re-arrested and detained in jail even if the witness did not appear because of some dereliction on the part of the prosecutor.

on a finding of no probable cause, the preliminary hearing following any re-arrest was scheduled before a judge of the Court of Common Pleas. In all cases, however, a re-arrest could proceed only after a judicial officer had approved a resubmission and determined that there was indeed probable cause for the re-arrest.

On January 1, 2000, the current version of Pa. R. Crim. P. 544 (then Pa. R. Crim P. 143) went into effect. The Rule provides:

> **Reinstituting Charges Following Withdrawal or Dismissal.**
>
> (A) When charges are dismissed or withdrawn at, or prior to, a preliminary hearing, the attorney for the Commonwealth may reinstitute the charges by approving, in writing, the refiling of a complaint with the issuing authority who dismissed or permitted the withdrawal of the charges.
>
> (B) Following the refiling of a complaint pursuant to paragraph (A), if the attorney for the Commonwealth determines that the preliminary hearing should be conducted by a different issuing authority, the attorney shall file a Rule 23 motion with the clerk of courts requesting that the president judge, or a judge designated by the president judge, assign a different issuing authority to conduct the preliminary hearing. The motion shall set forth

> reasons for requesting a different issuing authority.

Pa. R. Crim. P. 544. Nothing in the text of that rule requires the defendant's re-arrest pending completion of the second preliminary hearing. That practice arises from the specific policy at issue here, not from the language of the Rule.

The majority believes that Stewart is asking us "to deprive Pennsylvania of its right to reinitiate a criminal proceeding" following discharge of felony charges at a preliminary hearing. Maj. Op. at 12. The majority concludes that "there is no precedent of which we are aware, . . . for the proposition that the federal Constitution prohibits the reinitiation of a criminal proceeding in such a manner where double jeopardy has not attached and no pattern of prosecutorial harassment has been alleged." *Id.* However, that framing of the issue mischaracterizes the relief Stewart is seeking as well as the district court's order. The district court only enjoined the District Attorney from "ordering the re-arrest and detention, without judicial authorization, of any persons on any charge which has been dismissed by a Philadelphia Municipal Court judge at a preliminary hearing because of the failure of the Commonwealth .. . to establish probable cause or a *prima facie* case," *id.* at 5, and that is all Stewart is asking us to do.

The injunction does not preclude prosecutions; it precludes unauthorized detentions. It prevents the District Attorney from detaining a defendant pending a second preliminary hearing where a judge has dismissed the felony charges holding a defendant in custody. It also prevents the prosecutor's assessment of probable cause from outweighing

and reversing a judicial determination of probable cause. I do not think a request to do that is all that extraordinary.

Accordingly, the majority's declaration that "the District Court's injunction bars the District Attorney from *ever* reinitiating charges without prior judicial approval, no matter how much additional incriminating information she learns in the course of her investigation," is simply wrong. *See* Maj. Op. at 15 (emphasis in original).

Moreover, the District Attorney is not even arguing that enforcing the district court's injunction has the effect the majority assigns to it; nor could she. In discussions between the District Attorney's Office, the Defender Association of Philadelphia, and the Philadelphia Municipal Court, the District Attorney initially proposed that prosecutions be reinitiated under Rule 544 by simply refiling charges immediately after the Municipal Court dismissal without re-arresting the defendant. Pursuant to that policy, the refiled case would have received a new date for a preliminary hearing and the defendant would have received a subpoena to appear on that new date. For reasons unknown to us, the Defender Association and the Municipal Court rejected that proposal. Accordingly, since April 17, 2000, the District Attorney has ordered some defendants re-arrested with no additional judicial determination of probable cause under Rule 544. The prosecutor simply refiles identical charges and those defendants are immediately taken into custody to await a new preliminary arraignment on refiled charges that are identical

to charges that have just been dismissed by a judge.[5] Dist. Court Op. at 4.

III. The Fourth Amendment Prohibits These Re-Arrests.

The Fourth Amendment attempts to guard against unreasonable restrictions on liberty by requiring that an arrest be supported by probable cause, and that, where possible, a neutral magistrate determine if probable cause exists.[6] Thus, in *Katz v. United States*, in referring to the threshold showing needed for a search under the Fourth Amendment the Court stated, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967). More than half a century ago, the Supreme Court declared, "[t]o provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes *wherever possible*." *Trupiano v. United States*, 334 U.S. 699, 705, 92 L. Ed. 1663, 68 S. Ct. 1229 (1948) (emphasis added), *overruled on other*

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[5] It is not clear how the District Attorney decides who will be immediately re-arrested in this manner, and who will not be.

[6] The Fourteenth Amendment extends the Fourth Amendment's guarantee against unreasonable search or seizure to the states. *See Mapp v. Ohio*, 367 U.S. 643, 655, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961).

grounds by United States v. Rabinowitz, 339 U.S. 56, 94 L. Ed. 653, 70 S. Ct. 430 (1950).

In *Gerstein v. Pugh*, 420 U.S. 103, 43 L. Ed. 2d 54, 95 S. Ct. 854 (1975) the Supreme Court addressed the inherent tension between protecting an individual's liberty on the one hand, and the real world necessities of law enforcement on the other. The Court concluded that the Fourth Amendment resolves that tension by allowing a warrantless arrest under certain, limited circumstances. The resulting compromise achieves the necessary balance between law enforcement and individual liberty because "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of a crime, and for a brief period of detention to take the administrative steps incident to arrest." *Gerstein*, 420 U.S. 103, 114, 43 L. Ed. 2d 54, 95 S. Ct. 854.

The defendants in *Gerstein* were arrested pursuant to a prosecutor's information. Under applicable Florida rules and statutes, prosecutors could charge noncapital offenses by information without a preliminary hearing or leave of court. State courts had previously held that the prosecutor's filing of an information "foreclosed the suspect's right to a preliminary hearing. State courts had also held that habeas corpus was only available to challenge the probable cause for detention pursuant to an information under "exceptional circumstances. *Id.* at 106. "As a result, a person charged by information could be detained for a substantial period solely on the decision of the prosecutor." *Id.* On appeal, the Supreme Court framed the issue as follows: "whether a person arrested and held for trial under a prosecutor's information is constitutionally entitled to a judicial determination of probable

cause for pretrial restraint of liberty" *Id.* at 104. Stated another way, the issue was, "whether a person arrested and held for trial on an information is entitled to a judicial determination of probable cause for detention. . . ." *Id.* at 111.

The Court began its analysis of that question by discussing the aforementioned practical limitations that arise from the practicalities of law enforcement. The Court observed:

> Maximum protection of individual rights could be assured by requiring a magistrate's view of the factual justification prior to any arrest, but such a requirement would constitute an intolerable handicap for legitimate law enforcement. Thus, while the Court has expressed a preference for the use of arrest warrants when feasible, it has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant.

420 U.S. at 113. However, the relaxation of the warrant requirement is tightly tethered to circumstances that are sufficiently compelling to justify relaxing the protection endemic in review by a neutral magistrate. When such exceptional circumstances exist, "a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest." *Id.*

The necessity of allowing a police officer to react as circumstances unfold "on-the-scene" does not, however, minimize the importance of a suspect's liberty, nor permanently degrade his/her entitlement to having a judicial officer review the resulting arrest to determine if it was, in fact, reasonable. "Once the suspect is in custody, . . .[ ] the reasons justifying dispensing with the magistrate's neutral judgment evaporate. . . . And, while the State's reasons for taking summary action subside, the suspect's need for a neutral determination of probable cause increases significantly." *Id.* at 114.

The situation here is, of course, a bit different than the situation in *Gerstein*. Stewart actually received a probable cause hearing before a neutral magistrate. However, therein lies the proverbial "*rub*." As set forth above, that neutral magistrate determined that there was no probable cause to justify Stewart's continued restraint. Yet, despite this judicial determination, and perhaps *to spite* it, Stewart was immediately re-arrested under Rule 544 based solely upon the prosecutor's certification and filing. Therefore, although Stewart's initial arrest may well have been occasioned by an officer's on-the-scene observations or averments in a complaint, the circumstances after the arrest are not so extraordinary as to allow the prosecutor's assessment of probable cause to justify re-arrest if a neutral magistrate determines that there is no probable cause to support that re-arrest.

Stewart's case illustrates the constitutional infirmities of the District Attorney's policy. As noted above, the victim of the charged assault testified at Stewart's preliminary hearing, and the Commonwealth offered no other evidence to

support the charged felony. After hearing that witness testify, the Municipal Court Judge ruled that Stewart could only be held for court on misdemeanor assault, and dismissed the felony of aggravated assault. Inasmuch as judges are not permitted to make credibility determinations at the preliminary hearing stage, it is clear that the Municipal Court Judge hearing the victim's testimony concluded that the testimony was insufficient as a matter of law to sustain a conviction for aggravated assault even if the testimony were true. *See Commonwealth v. McBride*, 528 Pa. 153, 595 A.2d 589 (Pa. 1991). Yet, even though a judge ruled that the testimony of the victim was not sufficient to hold Stewart on the charge of felonious aggravated assault, Stewart was immediately re-arrested for that very charge, and jailed for at least two more weeks. Stewart was re-arrested (apparently before he could leave the courtroom), and thereafter jailed because he could not post bail a second time.

Nothing on this record establishes any "exigency" to justify that re-arrest. Although my colleagues postulate that the prosecutor's decision to re-arrest was based upon information gleaned from some sort of secret "database," it is clear that nothing on this record rises to the level of practical necessity that allows law enforcement officers to act upon on-the-scene judgments they are required to make while patrolling public streets. This is especially true when one considers that a judge has heard all of the evidence the prosecution had to offer and concluded that the Commonwealth could not legally detain Stewart on felony charges. *See Gerstein, supra.*

I am, of course, aware that Stewart's detention under Rule 544 was substantially shorter than that which troubled

the Supreme Court in *Gerstein*. I also realize that the second preliminary hearing must be held promptly after re-arrest under Rule 544. *See County of Riverside v McClaughlin*, 500 U.S. 44, 114 L. Ed. 2d 49, 111 S. Ct. 1661 (1991). The majority relies upon the 48 hour limit incorporated into Rule 544 to uphold the District Attorney's argument that she is free to re-arrest based only upon the prosecutor's assessment of probable cause provided that defendants receive a prompt judicial determination of probable cause as required by *Gerstein* and *County of Riverside*. *See* Maj. Op. at 11-12.

The majority concludes that the determination of probable cause made by the "issuing authority" at the preliminary arraignment provides the legal basis for the re-arrest after the preliminary hearing. My colleagues thus accept the District Attorney's distinction between the standard at the preliminary arraignment and the standard at the preliminary hearing. The majority agrees that dismissal at the preliminary hearing is based on a failure to meet a different, and substantially higher threshold, than that established at a preliminary arraignment. *See* Maj. Op. at 12 ("The Pennsylvania law requiring probable cause for arrests and a preliminary arraignment within 48 hours satisfies all that the Fourth Amendment requires, and there is no reason to believe that law was not fully complied with here.") (citing *Commonwealth v. Abdul-Salaam*,544 Pa. 514, 678 A.2d 342, 347-48, n.10 (Pa. 1996)). A close examination of the nature of preliminary hearings and preliminary arraignments illustrates the weakness of my colleagues' analysis.

As noted above, Pa. R. Crim. P. 540 establishes certain procedures that an issuing authority must follow at the preliminary arraignment following a warrantless arrest. It

includes a requirement that the issuing authority determine if there is probable cause for the arrest. If probable cause is found, the issuing authority must inform the defendant of the charges filed against him/her, appoint counsel and otherwise explain the right to counsel, set bail (assuming the defendant was arrested for a bailable offense), and inform the defendant of "the right to have a preliminary hearing." Pa. R. Crim. P. 540(D). The Rule also provides that "[u]nless the preliminary hearing is waived by a defendant who is represented by counsel," the issuing authority must set a date for a preliminary hearing "which shall not be less than 3 nor more than 10 days after the preliminary arraignment." *Id.*

The preliminary arraignment is often held before a defendant is represented by counsel, and the Rule provides the procedure for appointing counsel in such a case, and setting a date for a preliminary hearing (unless a defendant who is represented by counsel waives it). It is therefore clear from the context of the Rule that the preliminary arraignment is designed to inform the defendant of his/her rights, and provide a mechanism for setting bail, and appointing counsel. The Pennsylvania Superior Court has made this quite clear in the context of Pa. R. Crim. P. 516. In addressing the role of the preliminary arraignment following an arrest pursuant to a warrant under Rule 516, the Pennsylvania Supreme Court has stated:

> Rule 516 (formerly Rule 123) of the Pennsylvania Rules of Criminal Procedure requires that a person who is arrested be brought before a judicial officer for preliminary arraignment without unnecessary delay. *The purpose of this requirement* is to

> protect an accused's right to know the nature and cause of the accusation against him, his right to counsel, and his right to reasonable bail.[7]

Commonwealth v. Perez, 2000 PA Super 283, 760 A.2d 873, 875 (Pa. Super. 2000) (citing *Commonwealth v. Duncan*, 514 Pa. 395, 403, 525 A.2d 1177, 1181 (1987)) (emphasis added). If the Commonwealth is unable to establish a *prima facie* case at the preliminary arraignment, the defendant must be discharged. *See* Pa. R. Crim. P. 542(D).

Rule 516 (formally Rule 123) was enacted in 1995 in response to the Supreme Court's decision in *County of Riverside*. There, the Court required a probable cause determination "as soon as is reasonably feasible, but in no event later than 48 hours after arrest." *See Commonwealth v. Abdul-Salaam*, 544 Pa. 514, 678 A.2d 342 (Pa. 1996) (applying Riverside probable cause determination requirements to Pennsylvania criminal procedure).

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[7] Rule 516 requires that a defendant who is arrested with a warrant must be afforded a preliminary arraignment "*without delay*." Pa. R. Crim. P. 516 (emphasis added). Rule 540 then establishes the requirements for all preliminary arraignments.

It can be argued that Rule 516 does not focus on probable cause because it only applies when a defendant has been arrested pursuant to a warrant. Therefore, the neutral magistrate that issued the warrant has already determined probable cause to arrest. However, as I discuss below, Pennsylvania courts have not made that distinction.

The probable cause determination that is the focus of our inquiry is, of course, made during a preliminary hearing. The Pennsylvania Supreme Court has explained the function and importance of the preliminary hearing under the Pennsylvania Rules of Criminal Procedure:

> The basic principles of law with respect to the purpose of a preliminary hearing are well established. The preliminary hearing is not a trial. *The principal function of a preliminary hearing is to protect an individual's right against an unlawful arrest and detention.* At this hearing the Commonwealth bears the burden of establishing at least a *prima facie* case that a crime has been committed and that the accused is probably the one who committed it. It is not necessary for the Commonwealth to establish at this stage the accused's guilt beyond a reasonable doubt. In order to meet its burden at the preliminary hearing, the Commonwealth is required to present evidence with regard to each of the material elements of the charge and to establish sufficient probable cause to warrant the belief that the accused committed the offense.

Commonwealth v. McBride, 528 Pa. 153, 595 A.2d 589, 591 (Pa. 1991) (emphasis added) (citations omitted); *see also Commonwealth v. Hetherington*, 460 Pa. 17, 331 A.2d 205, 208 (Pa. 1975). Thus, under Pennsylvania law, the preliminary hearing is intended to insure that the government can establish sufficient facts to justify further detention. The

"probable cause determination" at the preliminary arraignment is merely intended to insure that circumstances justify holding the defendant for the 3 to 10 days it will take for the Commonwealth to present evidence of its *prima facie* case at the probable cause determination that occurs at the preliminary hearing. My colleagues state the following in discussing the distinction between the preliminary hearing, and preliminary arraignment:

> it is not at all clear to us that the "probable cause" standard and the "prima facie case" standard under Pennsylvania law require the Commonwealth to provide the same level of assurance that the subject has committed a crime. The different terms chosen to describe the Commonwealth's burden at the time of arrest and preliminary arraignment and its burden at the time of the preliminary hearings, suggest to us that prima facie case standard was intended to require different and greater assurance of guilt. "Probable cause," of course, speaks in terms of a probability while "prima facie case" has been defined by the Pennsylvania Supreme Court as evidence "such that if presented at the trial in court, and accepted as true, the judge would be warranted in letting the trial go to the jury."

Maj. Op. at 13. Although the majority concludes that the distinction between probable cause and *prima facie* case "is not at all clear" under the controlling law; Pennsylvania courts have stated that it is clear to them that no distinction exists. As noted above, the evidence that the Commonwealth

presents at the preliminary hearing must be "accepted as true," *see Commonwealth v McBride*, 528 Pa. 153, 595 A.2d 589 (Pa. 1991), just as the evidence at the preliminary arraignment must be.

Moreover, the Pennsylvania Superior Court has said:

> [I]t is clear that the concept of establishing a prima facie case is inextricably tied to a showing of probable cause. That is, for the Commonwealth to establish a prima facie case they need to show probable cause that the accused committed the offense. Therefore, *a finding by the magistrate that the Commonwealth did not establish probable cause that the appellant committed the violations for which he was charged is the same as a finding that the Commonwealth did not establish a prima facie case*. Thus contrary to appellant's assertion, there is no legal distinction to the choice of phraseology that the magistrate may have employed in dismissing the charges against him.

Commonwealth v. Sebek, 716 A.2d 1266, 1269 (Pa. Super. 1998) (emphasis added). As noted above, in Philadelphia County, the determination at the preliminary hearing is made by a Municipal Court Judge. The determination at the preliminary arraignment is made by a Bail Commissioner. It is the Municipal Court Judge presiding at the preliminary hearing whom Pennsylvania law charges with ensuring that the government is justified in depriving the suspect of his/her liberty. In *McBride*, the Pennsylvania Supreme Court

expressed no difficulty in concluding that: "the sole function [of the judge at a preliminary hearing] is to determine whether probable cause exists to require an accused to stand trial on the charges. . . ." 595 A.2d at 592. In *Gerstein*, the Court noted that "the sole issue" at the probable cause hearing required by the Fourth Amendment "is whether there is probable cause for detaining the arrested person pending further proceedings. . . . The standard is the same as that for arrest. That standard -- probable cause to believe the suspect has committed a crime. . . ." 420 U.S. at 120. Here, that determination was made at the preliminary hearing by the Municipal Court judge.

The majority bases its conclusion that probable cause is distinct from the *prima facie* case in *Pennsylvania on Commonwealth v. Cartegena*, 482 Pa. 6, 393 A.2d 350, 355 (Pa. 1978) (plurality opinion) (finding probable cause existed for the institution of criminal proceedings, though a *prima facie* case had not been established); *Commonwealth v. Days*, 718 A.2d 797, 800 (Pa. Super. 1998) ("probable cause is based on a finding of probability, not a prima facie showing of criminal activity"); and *Commonwealth v. Scott*, 279 Pa. Super. 8, 420 A.2d 717, 720 (Pa. Super. 1980) ("It would be unreasonable to require payment of costs every time the Commonwealth wanted to challenge a finding of lack of prima facie case when there had not even been a hint of harassment or failure to show probable cause."). *See* Maj. Op. at 14.

In *Commonwealth v. Cartagena*, the Pennsylvania Supreme Court did state that: "the Pennsylvania courts have recognized that the standard of probable cause and the *prima facie* case standard are conceptually distinct." However, the district court carefully considered *Cartagena*, and was not

persuaded. The district court's analysis of *Cartagena* is worth repeating here because it fully and accurately disposes of the District Attorney's reliance on that case. The district court relied upon *McBride* in stating the following:

> While the District Attorney was unable to articulate any practical distinction between the terms probable cause and prima facie case, she directs us to *Commonwealth v. Cartagena*, 482 Pa. 6, 393 A.2d 350, 355 (1978), in support of her position. While *Cartagena* seems to say that prima facie case and probable cause are different concepts under Pennsylvania law, it does not define them or explain the difference. *Cartagena* was decided over fifteen years before the institution of the present two-level system whereby a bail commissioner not learned in the law makes a probable cause determination and a Municipal Court judge thereafter makes a prima facie case determination. *McBride*, which was decided in 1991, has been construed by the Pennsylvania Superior Court to mean that the probable cause and prima facie case determinations are the same.

Stewart v. Abraham, 2000 U.S. Dist. LEXIS 10298, 2000 WL 1022958 *7 (E.D. Pa. 2000) (citations omitted). I agree. Moreover, it is important to note that, in *Cartagena*, unlike here, the District Attorney did not simply refile identical charges and seek to re-arrest a defendant without judicial intervention after a judge ruled that the prosecution did not establish probable cause for the initial charges. Instead:

> Appellant was arrested on May 31, 1975. A preliminary hearing was held in the Municipal Court of Philadelphia on June 5, 1975. The court took the matter under advisement and after hearing argument, found that a Prima facie case had not been established. The court ordered appellant discharged on June 13, 1975.
>
> The Commonwealth then drew up another more detailed criminal complaint and another arrest warrant. These documents were presented to a judge of the Court of Common Pleas of Philadelphia who signed the documents on June 16, 1975. Appellant was re-arrested, and following a preliminary hearing before another judge of the Court of Common Pleas of Philadelphia, appellant was held for trial . . . .

393 A.2d at 354. Accordingly, the District Attorney in *Cartagena* did not substitute his own determination for that of a neutral magistrate as the prosecutor seeks to do here. Moreover, in reaching the decision in *Cartagena* the Court stated, "when the magistrate believes that probable cause to hold the defendant has not been proven, he may discharge him; . . . If the Commonwealth deems itself aggrieved by his decision it may bring the matter again before any other officer empowered to hold preliminary hearings." *Id.* Thus, *Cartagena* assumes judicial approval for a second arrest following discharge at a preliminary hearing.

The majority's reliance upon a pronouncement of the Pennsylvania Superior Court in *Commonwealth v. Scott*, is also unconvincing. There, the court did state: "[i]t would be unreasonable to require payment of costs every time the Commonwealth wanted to challenge a finding of lack of prima facie case when there had not even been a hint of harassment or failure to show probable cause." 420 A.2d at 720. Indeed, the issue in Scott was the assessment of costs under then applicable Pa. R. Crim. P. 542(D). The Rule allowed costs to be taxed against the government if it did not establish a *prima facie* case "at the first preliminary hearing." *Id.* at 719. It also gave judges the discretion to discharge a defendant if, despite the prior discharge, "further proceedings on the same cause [were brought] without payment" *Id.* The decision does not establish a distinction between a *prima facie* case and probable cause, nor does it infer any such distinction. Moreover, it is interesting to note that even there, in 1980, the court used "probable cause" and "*prima facie* case" interchangeably as though the distinction my colleagues seek to draw did not exist. *Id* at 720. For example the court noted,

> it is especially unlikely that the intent of the Rule as revised was to require the payment of the cost . . . prior to any second prosecution because re-arrest and a second preliminary hearing is the only route open to the Commonwealth to test an issuing authority's judgment that a *prima facie* case has not been made out. It would be unreasonable to require payment of costs every time the Commonwealth wanted to challenge a finding of lack of a *prima facie* case when there had

> not even been a hint of harassment or failure to show probable cause.

420 A.2d at 720.

I am also not persuaded by the majority's citation to *Commonwealth v. Days*. There, the defendant was arrested following execution of a search warrant. The search conducted pursuant to that warrant revealed numerous vials of cocaine on her person and in her apartment, and she was convicted for possession of a controlled substance with intent to deliver. On appeal, she challenged the trial court's conclusion that probable cause existed for the search. In affirming the trial court's ruling, the Pennsylvania Superior Court did state: "[p]robable cause is based on a finding of probability, not a prima facie showing of criminal activity," 718 A.2d at 800, as my colleagues note. However, the court then stated: "the duty of this Court is to ensure that the magistrate had a substantial basis for concluding that probable cause existed." *Id*. Here, of course, the magistrate concluded that probable cause did not exist, and I fail to see how *Days* supports the proposition that the prosecutor is licensed to ignore that ruling.[8]

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[8] I realize that the Commonwealth is limited to admissible evidence at the preliminary hearing, whereas hearsay may be considered at the preliminary arraignment, and the majority's assertion that this creates a significant distinction between the prima facie case and the probable cause determination is not without force. However, given the strength of the authorities that suggest a contrary result, I can not agree that this distinction is so significant as to support the distinction the majority seeks to draw between those two proceedings.

Essentially then, we are asked to decide if the Fourth Amendment will tolerate a situation where an individual can be detained solely upon the certification of a prosecutor even though a judicial officer has determined that the prosecutor lacks probable cause for the defendant's continued detention. That question answers itself. I do not think that any system of ordered liberty based upon respect for a judiciary charged with interpreting neutral legal principles can condone the practice that the District Attorney urges upon us under its application of Rule 544 and which my colleagues have sanctioned.

My colleagues believe that Stewart is asking us "to bar the state from exercising its right to arrest when it believes in good faith that it has probable cause." *See* Maj. Op. at 16. I agree that nothing on this record suggests that Stewart's re-arrest was the result of bad faith. However, the constitutional analysis here does not turn on the good faith of the prosecutor. The issue is more fundamental than that. Even if such re-arrests always result solely from good faith beliefs of the prosecutor in the courtroom, the constitutional equation would still not balance in favor of allowing the prosecutor's judgment to negate the actions of a judicial officer who has just ruled that there is not a sufficient basis to deprive the defendant of his/her liberty on felony charges.

> [A] prosecutor's responsibility to law enforcement is inconsistent with the constitutional role of a neutral and detached magistrate. . . . Probable Cause for the issuance of an arrest warrant must be determined by someone independent of police and prosecution.

Gerstein, 420 U.S. at 117-8.

Moreover, the Supreme Court has already rejected the argument that a defendant's liberty interest can be held captive to the discretion of prosecutors in this manner. In *Gerstein*, the Court stated: "[a]lthough a conscientious decision that the evidence warrants prosecution affords a measure of protection against unfounded detention, we do not think prosecutorial judgment standing alone meets the requirements of the Fourth Amendment." 420 U.S. at 117.

It can hardly be otherwise. Anyone experienced in the emotions of criminal trials will realize what real world practicalities suggest. The prosecutor's motivations in causing a re-arrest under Rule 544 may often, at least in part, result from a sincerely held belief that the defendant "beat the case" or "got over" on the prosecutor. Such feelings may often be based upon little more than the emotions that are inherent in the adversarial process, and/or the prosecutor's obviously biased conclusions about the strength of his/her case. A system that conditions an individual's liberty on those motivations can hardly offer the protection that the Fourth Amendment requires; no matter how well-intentioned the prosecutor may be.

> Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is

> separately vested in the various participants upon whom the criminal law relies for its vindication.

Id. at 118 (citing *McNabb v. United States*, 318 U.S. 332, 87 L. Ed. 819, 63 S. Ct. 608 (1943)). That is why we have neutral magistrates, that is why the Supreme Court restricted the prosecution's authority to detain absent review of a neutral magistrate, and that is why the district court enjoined the policy that has been implemented under Rule 544 in Philadelphia County.

The requirement that a neutral magistrate evaluate probable cause amounts to precious little if it can be nullified by the prosecutor's certification that probable cause exists, especially when the certification is made immediately after a judge has ruled to the contrary. A prosecutor's "official oath [can] not furnish probable cause. . . ." *Gerstein*, 420 U.S. at 117. The prosecutor is in substantially the same position as a law enforcement officer who believes his/her view of the case to be correct, and his/her cause to be righteous. More than half a century ago, the Court stated

> [t]he point of the Fourth Amendment, which is often not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. 10, 13-14, 92 L. Ed. 436, 68 S. Ct. 367 (1948).[9]

If a defendant can not initially be detained "solely on the decision of a prosecutor," it would stand the Constitution on its head to allow the prosecutor that power after a judge has ruled that the prosecutor lacks probable cause to detain the defendant, and orders felony charges discharged. *Gerstein*, 420 U.S. at 106. The fact that a non-law trained Bail Commissioner may have previously held the defendant for court at a time when the defendant may not have been represented by counsel does not change the equation.

In *Gerstein* the Court determined that the practicalities that justified an initial warrantless arrest could not justify continued detention without a judicial determination of probable cause. Here, the Commonwealth asserts that practicalities justify continued detention for a brief period to allow it to establish the probable cause that it believes exists. However, the focus on practicality of prosecution and the brevity of the detention misses the point. It requires us to minimize both the importance of one's liberty, and the proper

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[9] We have previously noted that the competitive atmosphere of litigation will sometimes give rise to mixed motives on the part of an advocate (there, it was the prosecutor) attempting to admit evidence in a criminal trial. In *United States v. Sampson*, 980 F.2d 883, 886 (3d Cir. 1992) we stated, "Although the government will hardly admit it, the reasons proffered to admit prior bad act evidence . . . is often mixed between an urge to show some other consequential fact as well as to impugn the defendant's character."

role of the judge in determining the reasonableness of an arrest.

The detention that results in these cases may well be brief when compared to the more lengthy pretrial detentions in *Gerstein*. However, we ought not to devalue one's liberty to the extent of condoning even a brief period of incarceration following a warrantless arrest unless a neutral magistrate concludes that the prosecution has established probable cause. No informed officer of the court can seriously regard this procedural protection as a troublesome legal technicality, and I doubt that any prosecutor who is truly operating in good faith would regard it as such. "The history of liberty has largely been the history of observance of procedural safeguards and the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law." *McNabb v. U.S.*, 318 U.S. 332, 347, 87 L. Ed. 819, 63 S. Ct. 608 (1943).

Moreover, the brevity of the incarceration that follows re-arrest does not weigh nearly as heavily in the balance under these circumstances as the majority concludes. The Supreme Court has noted that circumstances may make a delay constitutionally unreasonable even if a probable cause hearing occurs within 48 hours of an arrest. While establishing the 48 hour rule for probable cause determinations in *County of Riverside*, the Court cautioned:

> This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate *Gerstein* if the arrested

> individual can prove that his or her probable cause determination was delayed unreasonably.

500 U.S. at 56.[10] The Court then provided examples of such unreasonable delay. It proclaimed: "Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, ..." *Id.* That is precisely what we have here. Therefore, I believe the majority places far too much reliance on the fact that the preliminary arraignments occur within 48 hours of arrest. *See* Maj. Op. at 12. ("The Pennsylvania law requiring probable cause for arrests and a preliminary arraignment within 48 hours satisfies all that the Fourth Amendment requires, . . .").[11]

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[10] In a different context, the Supreme Court has declared, "Authority does not suggest that a minimal amount of additional time in prison cannot constitute prejudice [under a Strickland analysis of competency of counsel]. *Quite to the contrary, our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance.*" *Glover v. United States*, 531 U.S. 198, 121 S. Ct. 696, 700, 148 L. Ed. 2d 604 (2001). (Emphasis added).

[11] The majority states that Stewart's arrest would have violated the Fourth Amendment if it had been made without probable cause, but concludes that "Stewart has not attempted to show. . . that the district attorney lacked probable cause at the time of his arrest or anyone else's." The majority notes that "the record does not reveal . . . what information was presented to the neutral magistrate at Stewart's second preliminary arraignment and was found to constitute probable cause." *See* Maj. Op. at 12, n. 4.

The record does, however, show that a judge ruled that the Commonwealth did not have probable cause to detain Stewart on

IV. Conclusion

For the reasons outlined above, I must respectfully disagree with the majority opinion insofar as my colleagues conclude that the district court erred in enjoining the District Attorney's current policy under Rule 544.

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the felony charges he was arrested for immediately after the judge made that ruling. Therefore, I believe that the majority's focus on the second preliminary arraignment is misplaced. The arrest had already occurred, and there is no dispute that a judge had already ruled that the Commonwealth had not presented the Municipal Court Judge (the relevant "neutral magistrate") with probable cause to support that arrest.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-2358

[Filed January 28, 2002]

ROBERT STEWART, on behalf of himself and all others similarly situated	)
v.	)
LYNNE ABRAHAM, District Attorney of Philadelphia County, individually and in her official capacity; DISTRICT ATTORNEY'S OFFICE OF PHILADELPHIA COUNTY Appellants	)

On Appeal from
United States District Court
for the Eastern District of Pennsylvania
Civil Action No. 00-cv-02425
District Judge: Hon. Harvey Bartle III

Before: Becker, Chief Judge, Sloviter, Mansmann, Scirica, Nygaard, Alito, Roth, McKee, Rendell, Barry, Ambro, Fuentes and Stapleton*, Circuit Judges

ORDER

The petition for rehearing en banc filed by the appellee in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied. Judge McKee would have granted rehearing.

By the Court,

/s/_____
Circuit Judge

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* Honorable Stapleton, Senior Judge for the Third Circuit Court of Appeals, limited to panel vote only.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 00-2425

[Filed July 17, 2000]

ROBERT STEWART, et al.	)
	)
v.	)
	)
LYNN ABRAHAM, DISTRICT ATTORNEY OF PHILADELPHIA COUNTY, et al.	)

JUDGE:
Harvey Bartle III, J.

MEMORANDUM

Bartle, J. July 17, 2000

This is an action pursuant to 42 U.S.C. §1983. Plaintiff Robert Stewart ("Stewart") challenges the constitutionality of his re-arrest and detention ordered by the District Attorney of Philadelphia County without judicial

authorization after a Municipal Court judge at a preliminary hearing dismissed a felony charge against him because of the failure of the Commonwealth to establish probable cause. Stewart, acting on behalf of himself and those similarly situated, contends that the practice of the District Attorney[1] to order such re-arrests and detention violates the Fourth and Fourteenth Amendments to the United States Constitution. He seeks declaratory and injunctive relief.

Pending before the court is plaintiff's motion for class certification under Rule 23 of the Federal Rules of Civil Procedure. The District Attorney opposes class certification and has moved to dismiss the action on abstention grounds. In order to expedite matters, the parties have entered into a stipulation of facts and have agreed that if the court does not dismiss this action, it should proceed to decide the case finally on the merits without the need for a preliminary injunction hearing.

I.

The following facts are not in dispute. In Philadelphia County, Pennsylvania, a criminal defendant who is charged in a felony complaint and arrested without a warrant is taken into custody and detained until a preliminary arraignment. *See* Pa. R. Crim. P. 102(a). At the preliminary arraignment, which takes place on average between 20 and 24 hours after

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[1] The complaint names both the District Attorney and the District Attorney's Office of Philadelphia County as defendants. For our purposes, there is no reason to differentiate between the two, and we will hereinafter refer to both as the District Attorney.

the suspect is taken into custody, a bail commissioner, who typically is not learned in the law, makes a probable cause determination and sets the conditions of pre-verdict release.[2] *See* Pa. R. Crim. P. 140(c), 4001, 4002. The suspect is then entitled to a preliminary hearing before a Philadelphia Municipal Court judge, who determines whether the Commonwealth can make out a "prima facie case" for the charges. Pa. R. Crim. P. 141(D). If the judge finds that the prosecution has met its burden on a felony charge, the judge will hold the case for trial in the Court of Common Pleas. *See* Pa. R. Crim. P. 142(a). If the judge dismisses the felony charges due to lack of evidence or lack of prosecution and only misdemeanor charges remain, the case will be heard in the Municipal Court. *See* Pa. R. Crim. P. 142(a), 6001(A). Of course, if the Commonwealth has not met its burden on any of the charges, they are dismissed in their entirety.

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[2] In 1984 the Pennsylvania General Assembly created the office of bail commissioner for the Philadelphia Municipal Court. *See* 42 Pa. Cons. Stat. Ann. §1123(a); *see also Murray v. Silberstein,* 882 F.2d 61, 62 (3d Cir. 1989). Beginning on January 1, 1995, Rule 140 of the Pennsylvania Rules of Criminal Procedure required that at a preliminary arraignment the "issuing authority," who in Philadelphia County is the bail commissioner, make a probable cause determination. This amendment to Rule 140 was adopted in response to the United States Supreme Court's decision in *County of Riverside v. McLaughlin*, 500 U.S. 44, 114 L. Ed. 2d 49, 111 S. Ct. 1661 (1991), that a probable cause determination generally must be made within 48 hours of arrest. *See Commonwealth v. Abdul-Salaam*, 544 Pa. 514, 678 A.2d 342, 347-48 n.10 (Pa. 1996); Comments to Pa. R. Crim. P. 140, 6003.

Under the rules of criminal procedure in effect prior to January 1, 2000, if the Municipal Court judge dismissed some or all of the criminal charges due to lack of evidence or lack of prosecution, the Commonwealth could seek to re-arrest the suspect by submitting a new criminal complaint and an affidavit of probable cause to a judge of the Court of Common Pleas. *See* Phila. Crim. R. 500(H). Only if the court approved the submission and issued a warrant could the suspect be re-arrested. A new preliminary hearing would then be scheduled.

On January 1, 2000, the current Rule 143 of the Pennsylvania Rules of Criminal Procedure went into effect. The rule provides:

> Reinstituting Charges Following Withdrawal or Dismissal.
>
> (A) When charges are dismissed or withdrawn at, or prior to, a preliminary hearing, the attorney for the Commonwealth may reinstitute the charges by approving, in writing, the refiling of a complaint with the issuing authority who dismissed or permitted the withdrawal of the charges.
>
> (B) Following the refiling of a complaint pursuant to paragraph (A), if the attorney for the Commonwealth determines that the preliminary hearing should be conducted by a different issuing authority, the attorney shall file a Rule 23 motion with the clerk of courts requesting that the president judge, or a judge

> designated by the president judge, assign a different issuing authority to conduct the preliminary hearing. The motion shall set forth the reasons for requesting a different issuing authority.

Pa. R. Crim. P. 143.

Beginning on April 17, 2000, the District Attorney has ordered suspects re-arrested pursuant to a new procedure, purportedly authorized by the new Rule 143. Now, when charges are dismissed by a Municipal Court judge, the District Attorney on her own initiative has refiled charges and had suspects rearrested and taken into custody until a new preliminary arraignment occurs on the refiled charges.

On March 24, 2000, Stewart was arrested, taken into custody, and charged with one felony count of aggravated assault, and misdemeanor counts of simple assault, recklessly endangering another person, and possession of an instrument of crime. The criminal charges arose out of Stewart's alleged involvement in the beating of another man. On March 25, 2000, Stewart was preliminarily arraigned and released on bail. His preliminary hearing was scheduled for April 4, 2000. After Stewart requested a continuance, his preliminary hearing was rescheduled for April 28, 2000. At the conclusion of the April 28 hearing at which the victim testified, the Municipal Court discharged the felony count of aggravated assault and scheduled the case for trial in the Municipal Court on the remaining misdemeanor charges.

The District Attorney immediately reinstituted an identical felony charge of aggravated assault against Stewart

based upon the same purported beating incident. Police officers re-arrested Stewart on April 28, 2000, and he remained in custody until his second preliminary arraignment on April 29, 2000. Stewart continued in jail until May 13, 2000 because he was not able to make bail. His preliminary hearing was held on June 7, 2000.

II.

We now turn to the District Attorney's motion to dismiss. She contends that we must abstain from deciding this action because of the comity and federalism concerns set forth in *Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971). There, while the state criminal proceeding was underway, a criminal defendant filed a federal action seeking to enjoin the District Attorney of Los Angeles County from prosecuting him under the California Criminal Syndication Act. The accused contended that the statute violated his right to free speech under the First and Fourteenth Amendments. The Supreme Court aptly observed that "[a] federal lawsuit to stop a prosecution in a state court is a serious matter." *Id.* at 42. Underscoring the importance of federalism and comity, the Court held that "the possible unconstitutionality of a statute 'on its face' does not in itself justify an injunction against good-faith attempts to enforce it." *Id.* at 54. The *Younger* case stands for the proposition that the federal courts may not enjoin or interfere with a pending state criminal prosecution absent "bad faith, harassment, or any other unusual circumstance," even though the accused will have to face the rigors of a state trial in order to raise his or her federal constitutional claim. *Id.*

Since *Younger*, the Supreme Court has decided *Gerstein v. Pugh*, 420 U.S. 103, 43 L. Ed. 2d 54, 95 S. Ct. 854 (1975). In *Gerstein*, an action under 42 U.S.C. §1983, plaintiffs were defendants in state criminal proceedings in Florida who either had insufficient means to make bail or were denied bail and were being held in jail awaiting trial pursuant to the prosecutor's information. They had no right to a pretrial hearing to determine the existence of probable cause for detention except under a special statute, but a hearing pursuant to that statute was "often delayed a month or more after arrest." *Id.* at 106. They sought declarative and injunctive relief from a federal court to compel the state courts to provide them with prompt probable cause hearings. In holding the Florida procedure unconstitutional, the Supreme Court declared that the state "must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest." *Id.* at 125 (footnotes omitted).

The defendants in *Gerstein* contended that the federal court should abstain under Younger. The Supreme Court rejected the argument, explaining:

> The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions, *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971). The injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be

> raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of the trial on the merits.

Id. at 108 n.9. (citations omitted).

The District Attorney argues that granting relief to Stewart here would seriously interfere with the state criminal proceedings and thus contravene *Younger*. She distinguishes *Gerstein* on the ground that the plaintiffs there had no remedy to challenge their illegal pretrial detention under Florida law while in Pennsylvania an accused can always mount such a challenge through a writ of habeas corpus, citing *Commonwealth v. Bernhardt*, 359 Pa. Super. 413, 519 A.2d 417 (Pa. Super. 1986).

The facts in *Gerstein* are not quite as the District Attorney suggests. The Supreme Court never said that the plaintiffs there had no remedy in the state courts. While the accuseds had no right to a prompt probable cause hearing, the Supreme Court did not conclude that habeas corpus was completely foreclosed under Florida law or that Florida would not have allowed an accused to bring a separate action in its state courts challenging on constitutional grounds the lack of such a hearing. In any event, we do not believe that the Supreme Court based its decision on the non-existence of remedies or on the existence of only narrowly prescribed remedies in the state court. Instead, the Court focused on the fact that the federal courts were not interfering with a state criminal trial and thus the imperatives of comity and federalism were not implicated. Requiring a prompt probable cause hearing did not inhibit an adjudication on the merits or

preempt a state court from first passing on any defense, including a challenge to the constitutionality of the statute allegedly violated.

The District Attorney also cites the Supreme Court's later decision in *Juidice v. Vail*, 430 U.S. 327, 51 L. Ed. 2d 376, 97 S. Ct. 1211 (1977), in support of her position on abstention. We find that case to be inapposite. There the plaintiffs were judgment debtors held in contempt and imprisoned by a New York state court. Although they had notice of the contempt proceedings, they never appeared at any of the scheduled hearings. Instead, they filed a federal court action challenging the constitutionality of the state contempt procedures and their subsequent confinement. The Supreme Court held that abstention was required because the judgment debtors had ample opportunity to raise their constitutional defenses in the state contempt proceedings. *See Juidice*, 430 U.S. at 337-39. In distinguishing *Gerstein*, the *Juidice* Court emphasized that in the earlier case, "'the injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution.'" *Id.* at 337 (citing *Gerstein, 420 U.S. at 108 n.9)*. The Court then observed, "Here [in *Juidice*] it is abundantly clear that [plaintiffs] . . . had an opportunity to present their federal claims in the state proceedings." *Id.* It added that the judgment debtors "need be accorded only an opportunity to fairly pursue the constitutional claims in the ongoing state proceedings." *Id.* (emphasis added).

Our view that *Gerstein* did not rest on the absence of state remedies is supported, at least implicitly, by the more recent Supreme Court decision in *County of Riverside v.*

McLaughlin, 500 U.S. 44, 114 L. Ed. 2d 49, 111 S. Ct. 1661 (1991). In that case the Court decided the question, left open in *Gerstein*, as to what was meant by a "prompt" probable cause hearing. The case arose out of California. The Supreme Court made no mention of the lack of remedies in the state court as a reason for taking the case or as the rationale for its earlier ruling in *Gerstein*. Instead, it dealt directly with the significant Fourth Amendment question involved.

As in *Gerstein* and *County of Riverside* and unlike *Younger* and *Juidice*, any decision by this court to grant injunctive relief would not be directed at the state prosecution as such. *See Gerstein*, 420 U.S. at 108 n.9. The Commonwealth would not be prejudiced in the conduct of any trial of Stewart on the merits. *Id.* Likewise, as in *Gerstein* and *County of Riverside*, and unlike *Younger* and *Juidice*, it is conceded that the Fourth Amendment issue raised here could not be raised as a defense in the underlying state court trial.

Plaintiff readily admits that he has a habeas corpus remedy in the courts of the Commonwealth, a remedy which may or may not have been available to the accuseds in *Gerstein*. Nonetheless, he asserts that he also has a remedy available under 42 U.S.C. §1983 and is entitled to vindicate in a federal court his federal constitutional right to be free from an unreasonable seizure. He reminds us that we have an unflagging duty to exercise our jurisdiction. *See New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 358-59, 105 L. Ed. 2d 298, 109 S. Ct. 2506 (1989); *Deakins v. Monaghan*, 484 U.S. 193, 203, 98 L. Ed. 2d 529, 108 S. Ct. 523 (1988). Plaintiff's position is persuasive.

Accordingly, we will deny the motion of the District Attorney to abstain.

III.

Stewart seeks to bring this action not only on behalf of himself but also on behalf of:

> All persons who have been or will in the future be subjected to the practice and policy of the defendant District Attorney of re-arresting, without judicial authorization, persons whose criminal charges have been dismissed by a Philadelphia Municipal Court Judge based on a determination that the Commonwealth had not established, by reason of lack of evidence or lack of prosecution, probable cause to hold the criminal case for trial.

Pl's Mot. for Class Certif. Prop. Order.

In order for class certification to be granted, the plaintiff must first establish that he meets all four prerequisites of Rule 23(a), which provides:

> (a) **Prerequisites to a Class Action**. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative

> parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

Although the numerosity requirement has no set minimum, it is generally accepted that if the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been satisfied. *See* 5 James Wm. Moore et al., Moore's Federal Practice P 23.22[3][a] (3d ed.). Here, it has been stipulated that for the 68 day period from April 17 through June 23, 2000, 67 people were subjected to re-arrest after the Municipal Court discharged their cases. The number can only increase as time passes. We are convinced that the joinder of all class members would be impracticable and therefore that the numerosity requirement of Rule 23(a) has been met.

It is also clear that Rule 23(a)'s requirements of commonality and typicality - two closely related factors - have been fulfilled. The sole constitutional issue is identical for all of the class members: is it constitutional for the District Attorney to re-arrest suspects by her own order and without judicial approval after a court has dismissed the charges due to the Commonwealth's failure to establish that the defendant probably committed the crime in question? The relief the class members seek arises from the same course of conduct on the part of the defendant. *See Baby Neal for and by Kanter v. Casey*, 43 F.3d 48, 58 (3d Cir. 1994). The salient questions of fact and law are common to the class, and the claims and defenses are typical for all parties.

Finally, plaintiff, as class representative, must fairly and adequately protect the interests of the class. In order to do so, he must establish that his counsel is qualified and experienced and that plaintiff has no interest antagonistic to the class. *See Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 247 (3d Cir. 1975). There is no dispute that plaintiff's counsel is an able and experienced class action litigator. Furthermore, the interests of the plaintiff and the absent class members coincide in all material respects.

Stewart has a further hurdle to overcome. In addition to the prerequisites of Rule 23(a), he must satisfy the provisions of either Rule 23(b)(1), Rule 23(b)(2), or Rule 23(b)(3). He relies on Rule 23(b)(2) which reads:

> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Fed. R. Civ. P. 23(b)(2). Clearly the District Attorney has acted on grounds generally applicable to the class members by ordering their re-arrest and detention after a Municipal Court judge has dismissed the charges for failure of the Commonwealth to meet its evidentiary burden to hold them for trial. Moreover, plaintiff seeks declaratory and injunctive relief only, which would benefit the entire class as a whole. Rule 23(b)(2) is designed for just such a situation. *See Baby Neal*, 43 F.3d at 59; *Hassine v. Jeffes*, 846 F.2d 169, 179 (3d Cir. 1988). Under the circumstances, plaintiff has established his right to proceed under Rule 23(b)(2).

We will grant the motion of plaintiff for class certification as requested.

IV.

Finally, we come to the merits. As noted above, in Philadelphia a person charged with a crime is given a preliminary arraignment before a bail commissioner, followed by a preliminary hearing before a Municipal Court judge. The bail commissioner, shortly after the arrest, determines whether there is "probable cause," and the Municipal Court judge thereafter determines whether there is a "prima facie case." According to the District Attorney, the Municipal Court judge is applying a standard higher than probable cause, and the judge's decision to dismiss the charges does not vitiate the earlier finding of probable cause by the bail commissioner. We find this argument to be without merit. In *Commonwealth v. Sebek*, 716 A.2d 1266, 1269 (Pa. Super. 1998), the Superior Court explained, "it is clear that the concept of establishing a prima facie case is inextricably tied to a showing of probable cause. That is, for the Commonwealth to establish a prima facie case they need to show probable cause that the accused committed the offense." *See also McKibben v. Schmotzer*, 700 A.2d 484, 493 (Pa. Super. 1997); *Commonwealth v. Gray*, 322 Pa. Super. 37, 469 A.2d 169, 174 (Pa. Super. 1983), *aff'd*, 509 Pa. 476, 503 A.2d 921 (Pa. 1985).

> The Pennsylvania Supreme Court has declared:
>
> The principal function of a preliminary hearing is to protect an individual's right against an

> unlawful arrest and detention. At this hearing the Commonwealth bears the burden of establishing at least a *prima facie* case that a crime has been committed and that the accused is probably the one who committed it .... It is not necessary for the Commonwealth to establish at this stage the accused's guilt beyond a reasonable doubt .... In order to meet its burden at the preliminary hearing, the Commonwealth is required to present evidence with regard to each of the material elements of the charge and to establish sufficient probable cause to warrant the belief that the accused committed the offense.

Commonwealth v. McBride, 528 Pa. 153, 595 A.2d 589, 591 (Pa. 1991) (citations omitted).

While the District Attorney was unable to articulate any practical distinction between the terms probable cause and prima facie case, she directs us to *Commonwealth v. Cartagena*, 482 Pa. 6, 393 A.2d 350, 355 (1978), in support of her position. While *Cartagena* seems to say that prima facie case and probable cause are different concepts under Pennsylvania law, it does not define them or explain the difference. *Cartagena* was decided in 1978, over fifteen years before the institution of the present two-level system whereby a bail commissioner not learned in the law makes a probable cause determination and a Municipal Court judge thereafter makes a prima facie case determination. *McBride*, which was decided in 1991, has been construed by the Pennsylvania Superior Court to mean that the probable cause and prima facie case determinations are the same. *See Sebek*, 716 A.2d

at 1269; *McKibben*, 700 A.2d at 493. Moreover, *McBride* teaches that the function of the preliminary hearing where the issue of a prima facie case is determined is "to protect an individual's right against unlawful arrest and detention." *McBride*, 595 A.2d at 591. To the extent *Cartagena* is inconsistent with *McBride*, we will follow the latter as the more recent pronouncement of the Pennsylvania Supreme Court. We conclude that, for Fourth Amendment purposes, the term prima facie case in Pennsylvania is synonymous with the term probable cause.

It is undisputed that the District Attorney of Philadelphia County ordered Stewart's re-arrest and detention on April 28, 2000 after a Municipal Court judge found that no probable cause existed to hold him for trial on the charge of aggravated assault. It is also stipulated that it is now the general practice of the District Attorney, where she believes the action to be warranted, to order re-arrests and detention without judicial authorization after a Municipal Court judge has found no probable cause. Thus, the prosecutor is deciding to hold persons in custody despite the fact that a judicial officer has concluded they should not be held. From April 17, 2000 to June 23, 2000 there were 67 such instances. In each case, the accused was thereafter detained for an average of 20 to 24 hours until a preliminary arraignment before a bail commissioner could be held. Three of the 67, including plaintiff, remained in jail on the re-arrested charge after the preliminary arraignment, while the remaining were released on bail pending trial.

The Fourth Amendment provides in relevant part:

> The right of the people to be secure in their persons ... against unreasonable ... seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing ... the persons ... to be seized.

The Fourth Amendment is applicable to the states under the Due Process Clause of the Fourteenth Amendment. *See Mapp v. Ohio*, 367 U.S. 643, 655, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961).

Probable cause under the Fourth Amendment simply means that there is probable cause to believe that the suspect committed the crime in issue. *See Gerstein*, 420 U.S. at 120. It is a crucial underpinning of the Fourth Amendment that neutral and detached magistrates make the probable cause determinations. *See id.* at 112, 114. Nonetheless, recognizing the imperatives of public safety and the practical realities of law enforcement, the Supreme Court has interpreted the Fourth Amendment to allow the police to arrest a person without a warrant and without a prior judicial determination of probable cause, provided that the arrestee be given a prompt probable cause hearing to determine whether he or she may be detained or held for trial. *See id.* at 113-14. The Fourth Amendment prohibits subjecting a person to continued arrest and detention on the order of the police or a district attorney without the prompt review and approval of a magistrate. *See County of Riverside*, 500 U.S. 44, 114 L. Ed. 2d 49, 111 S. Ct. 1661.

The District Attorney argues that it is always constitutional to detain a person for a short period of time

prior to a probable cause hearing. She relies on *Gerstein*. She maintains that for constitutional purposes a re-arrest should be treated the same as an initial arrest. In other words, in her view, so long as a timely probable cause hearing is held after the re-arrest, no constitutional infirmity exists.[3] We disagree. While it is true that *Gerstein* held that it is sufficient if a prompt probable cause hearing is held after an arrest, that decision dealt only with initial arrests and not with the Fourth Amendment as it applies to subsequent arrests for the same charge.

In performing our analysis concerning re-arrests, we consider the underlying rationale of the Fourth Amendment as interpreted in *Gerstein*. This constitutional safeguard is designed to protect persons against unreasonable seizures, that is, against arbitrary arrests. It circumscribes within narrow limits the power of the police or prosecutor to hold someone for a crime unless a judicial officer, who is not an arm of law enforcement, finds under the evidence presented that the accused probably committed the crime in issue. Unless this important threshold is met, a person's liberty should not be infringed, and he or she should not be forced to suffer the duress and ignominy of detention or a trial.

In the case before us, a judicial officer, a Municipal Court judge, determined that no probable cause existed to charge Stewart with aggravated assault. Such a holding, of course, is not res judicata. *See Morse v. United States*, 267

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[3] The District Attorney recognizes that continued rearrests could not be allowed simply to harass the arrestee. That is not an issue here.

U.S. 80, 85, 69 L. Ed. 522, 45 S. Ct. 209 (1925). At that stage jeopardy has not attached. *See Serfass v. United States,* 420 U.S. 377, 388, 43 L. Ed. 2d 265, 95 S. Ct. 1055 (1975). If the District Attorney disagrees with the judge's decision, she is always free to ask the judge to reconsider, ask another judge to hold a probable cause hearing where the same or more evidence is presented, or seek to have the Municipal Court judge reversed by a Common Pleas judge or a higher court. If the judge agrees with her, the suspect is then re-arrested. Up until recently, this is precisely the procedure that the District Attorney followed.

Instead, what the District Attorney is doing currently is usurping the function of the judicial officer. She herself, in effect, is overruling the judge's finding by deciding that probable cause exists when the judge has decided it does not exist. Under the present scenario, when the judge rules from the bench that the accused is free because the Commonwealth had not met its burden, but before the supposedly freed man or woman exits the courtroom, the handcuffs, literally or figuratively, are slapped on him or her by order of the District Attorney for the exact same charges that were just dismissed. That person is then jailed until another preliminary arraignment is held.

The District Attorney cannot be allowed to substitute her view of probable cause for that of the judge. While she or the police may make a probable cause determination without judicial approval in connection with the initial arrest and do so in the interest of public safety and legitimate law enforcement, this interest evaporates once a judge has declared that probable cause has not been established. In advance of the initial arrest, the judicial voice, as a practical

matter, often cannot be heard. *See Gerstein*, 420 U.S. at 113. However, once the judge's pronouncement has taken place, the situation has changed dramatically. It has changed dramatically because there is now a judicial finding that insufficient evidence exists to establish that the arrestee probably committed the crime in question. At that point, the District Attorney's power is constrained. Unless and until a judicial finding of probable cause is made thereafter by the same judge or another judge of equal or higher rank, the District Attorney and the police simply cannot re-arrest the accused on the same charge. Otherwise, the protections of the Fourth Amendment requiring a judicial determination will be rendered nugatory.

In summary, the present practice of the District Attorney of Philadelphia County in ordering on her own initiative and without judicial authorization the re-arrest and detention of persons for charges which a judicial officer has previously dismissed because of a lack of probable cause violates the fundamental protection of the Fourth Amendment of the United States Constitution against unreasonable seizures. Such a practice will be enjoined.

This decision, we hasten to emphasize, does not put the District Attorney into a straitjacket. Absent new procedures which pass constitutional muster, she may follow the time-honored practice for rearrests heretofore utilized throughout the Commonwealth.

ORDER

AND NOW, this 17th day of July, 2000, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the motion of the defendant District Attorney of Philadelphia County to dismiss is DENIED; and

(2) the motion of the plaintiff for class certification to represent the following class is GRANTED:

All persons who have been or will in the future be subjected to the practice and policy of the defendant District Attorney of re-arresting, without judicial authorization, persons whose criminal charges have been dismissed by a Philadelphia Municipal Court Judge based on a determination that the Commonwealth had not established, by reason of lack of evidence or lack of prosecution, probable cause to hold the criminal case for trial.

BY THE COURT:
Harvey Bartle III

FINAL INJUNCTION

AND NOW, this 17th day of July, 2000, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that the District Attorney of Philadelphia County, her agents, employees, attorneys and all persons in active concert or participation with them who receive actual notice of this Order are permanently enjoined from ordering the re-arrest and detention, without judicial authorization, of

any persons on any charge which has been dismissed by a Philadelphia Municipal Court judge at a preliminary hearing because of the failure of the Commonwealth of Pennsylvania to establish probable cause or a prima facie case.

BY THE COURT:
Harvey Bartle III

Filed
[redacted]
MAY 31 02
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 01-1496

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT STEWART, on Behalf of Himself
and All Others Similarly Situated,
Petitioners

v.

LYNN ABRAHAM, District Attorney of
Philadelphia County, Individually and in Her Official
Capacity; DISTRICT ATTORNEY'S OFFICE OF
PHILADELPHIA COUNTY
Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does petitioner's Fourth Amendment claim, premised on inaccurate representations of Pennsylvania law, state a federal question?

A. Under Pennsylvania law, if a preliminary hearing judge dismisses charges because the Commonwealth has not established a prima facie case as to each element of each crime charged, is the judge employing the same standard used to assess probable cause for arrest under the Fourth Amendment?

B. Does the dismissal of charges at a Pennsylvania preliminary hearing for lack of a prima facie case preclude the Commonwealth from rearresting the defendant on refiled charges?

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The Philadelphia District Attorney's Office respectfully requests that the petition for certiorari be denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Rule 544 of the Pennsylvania Rules of Criminal Procedure provides:

> (A) When charges are dismissed or withdrawn at or prior to a preliminary hearing, the attorney for the Commonwealth may reinstitute refiling of a complaint with the issuing authority who dismissed or permitted the withdrawal of the charge.

Pa. R. Crim. P. 544(A), 42 Pa.C.S.

COUNTER-STATEMENT OF THE CASE

Pursuant to its rulemaking authority, the Pennsylvania Supreme Court promulgated new Rule 544 of the

Pennsylvania Rules of Criminal Procedure.[1] Rule 544 became effective on January 1, 2000. Prior to its promulgation, there was no state-wide procedural rule that addressed the reinitiation of charges following their dismissal at a preliminary hearing. Rule 544 was drafted to reflect prevailing practice among Pennsylvania prosecutors, pursuant to well-established Pennsylvania law, under which prosecutors, in the exercise of their discretion, reinstituted charges as long as the statute of limitations had not run and the action was not undertaken to harass the defendant.

Petitioner Robert Stewart was arrested on March 24, 2000, and charged with aggravated assault, simple assault, recklessly endangering another person, and possession of an instrument of crime. Because his crime was a felony, no warrant was required before his arrest. Accordingly, at his preliminary arraignment shortly after arrest, a judicial officer determined that probable cause supported the arrest, and that petitioner could be detained pretrial pursuant to *Gerstein v. Pugh*, 420 U.S. 103, 126 (1975). At the preliminary arraignment, petitioner's case was scheduled for a preliminary hearing. Under Rule 542(D) of the Pennsylvania Rules of Criminal Procedure, at the preliminary hearing the Commonwealth must establish a prima facie case for each offense charged or the charges must be dismissed.

At petitioner's preliminary hearing, the aggravated assault charge was discharged and the case was scheduled for trial on the misdemeanors. The Commonwealth then decided to reinitiate the aggravated assault charge and petitioner was

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[1] This Rule was previously designated Rule 143 and was renumbered by the state Supreme Court effective April 1, 2001.

rearrested pursuant to Rule 544.[2] Petitioner then received a new preliminary arraignment, at which time a judicial officer again determined that there was probable cause for his arrest. Thereafter a preliminary hearing was held on the refiled charges and the court found a prima facie case of aggravated assault.

While petitioner's criminal case was pending in state court, he filed a civil suit in federal court, claiming that, under Pennsylvania law, a preliminary hearing dismissal is nothing more than a Fourth Amendment probable cause determination, and that his rearrest after the dismissal was therefore unconstitutional. He sought a preliminary injunction and class action certification. The District Attorney's Office filed a motion to dismiss. On July 17, 2000, the District Court denied that motion and issued a permanent injunction enjoining the rearrest of Pennsylvania felons after preliminary hearing dismissals, unless a court first approved. The District Court denied the District Attorney's Office's motion for a stay of that order pending appeal. On August 9, 2000, the District Attorney's Office filed Notice of Appeal

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[2] Petitioner chooses to portray the rearrest procedure here as the product of a new "policy" of the Philadelphia District Attorney's Office. Tellingly, however, he makes no argument that the prosecutor's "policy" was in any way inconsistent with the statewide rule of criminal procedure. In reality, the only reason the "policy" changed is that the state rules changed, making clear that Philadelphia could conduct rearrests in the same fashion as in the rest of the Commonwealth. Petitioner, of course, remained free to argue that the practice somehow violated the rule, but such a position would only have highlighted the fact that his claim is in essence one of state law.

and on August 23, 2000, the Third Circuit granted its motion for a stay pending appeal.

On December 26, 2001, the Third Circuit upheld the District Court in declining to abstain under *Younger v. Harris*, 401 U.S. 37 (1971), but reversed on the merits, concluding that rearrest after a preliminary hearing dismissal under Pennsylvania law does not implicate the Fourth Amendment.

REASONS FOR DENYING THE WRIT

A PENNSYLVANIA TRIAL COURT FINDING THAT A PRIMA FACIE CASE HAS NOT BEEN ESTABLISHED FOR EACH ELEMENT OF EACH CRIME CHARGED DOES NOT UNDO THE EARLIER FOURTH AMENDMENT PROBABLE CAUSE DETERMINATION; NO FEDERAL CLAIM IS PRESENTED HERE.

Quite peculiarly for a Fourth Amendment arrest case, this petitioner does not challenge the facts supporting probable cause for his arrest, or for his rearrest. Instead he argues that, because a Pennsylvania preliminary hearing judge found the absence of a "prima facie case" after the initial arrest, the state could not constitutionally rearrest him without first negating the preliminary hearing ruling. The argument depends completely on petitioner's attempt, throughout the litigation below and the certiorari petition here, to confound the Fourth Amendment concept of probable cause with Pennsylvania's state law requirement that, at the preliminary hearing, the Commonwealth must prove -- in an adversary proceeding, with competent, admissible evidence -- a prima facie case to support each element of each crime charged. When these concepts are correctly distinguished in the

manner recognized in *Gerstein v. Pugh*, 420 U.S. 103 (1975), it is quite clear that petitioner's entire Fourth Amendment argument collapses to nothing but a question of Pennsylvania law. Petitioner's attempt to engraft Pennsylvania procedure onto the Fourth Amendment does not merit this Court's review.[3]

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[3] Indeed, the most appropriate disposition of this case in the federal courts below should have been abstention under *Younger v. Harris*, 401 U.S. 37 (1971), to allow the Pennsylvania courts to resolve petitioner's challenge to his rearrest in the context of his then-pending criminal prosecution.

The Court of Appeals declined *Younger* abstention, on the ground that petitioner was challenging the procedure by which he was rearrested rather than the constitutionality of the prosecution in itself. Accordingly, reasoned the Third Circuit, his procedural challenge was not a "defense" to the state charges, and his federal lawsuit would not "interfere" with the prosecution.

This Court has made clear, however, that *Younger* abstention during ongoing state criminal proceedings is required whether or not the federal challenge would constitute a legal defense to the charges; the only question is whether the state criminal defendant's federal claim could have been adjudicated in state court. "[I]t is abundantly clear that appellees had an opportunity to present their federal claims in the state proceedings. *No more is required to invoke* Younger *abstention.*" *Juidice v. Vail*, 430 U.S. 327, 337 (1977) (emphasis added, footnote omitted). *Accord Moore v. Sims*, 442 U.S. 415, 425 (1979).

(Continued)

As the Court of Appeals observed, there is no suggestion in the record that police lacked probable cause to arrest petitioner pursuant to the Fourth Amendment, nor any suggestion that petitioner was detained for more than 48 hours before a magistrate determined probable cause. "These facts should have ended the matter and mandated summary judgment in defendants' favor." *Stewart v. Abraham*, 275 F.3d 220, 228-229 (3d Cir. 2001).[4]

(Continued)

In this case, because the rearrest procedure occurs in the context of a pending criminal matter, the pending state prosecution would have been the perfect place for petitioner to litigate his Fourth Amendment claim. *See ASCARO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (state courts "possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law"). But petitioner never even attempted to do so. Instead he preferred to place himself in a different forum for the resolution of the state law issues essential to his Fourth Amendment claim.

[4] What Stewart asks us to do is to deprive Pennsylvania of its right to reinitiate a criminal proceeding in accordance with a generally applicable process that is entirely consistent with the dictates of the applicable Fourth Amendment law. There is no precedent of which we are aware, however, for the proposition that the federal Constitution prohibits the reinitiation of a criminal proceeding in such a manner where double jeopardy has not attached and no pattern of

(Continued)

Petitioner nonetheless attempts to create a probable cause issue by mischaracterizing Pennsylvania law. Contrary to his argument, however, dismissal of charges at a Pennsylvania preliminary hearing does not constitute a judicial determination that the defendant was arrested without probable cause for purposes of the Fourth Amendment. Rather, as the Court of Appeals observed, a preliminary hearing dismissal is simply a ruling that, at that particular time, the matter should not proceed to trial because the Commonwealth has not met the more stringent burden of establishing a prima facie case as to each element of each crime charged. Id. at 229-30.

In Pennsylvania, the determination of probable cause, for warrantless arrest cases under *Gerstein*, occurs at preliminary arraignment within twenty-four hours after arrest. At this stage, the magistrate does not take evidence or review all elements of the various offenses that may be charged, but considers only whether police had reason to believe that the arrestee committed some crime. This determination of the probability of criminal activity, which the Fourth Amendment requires, is vastly different from the adversarial proceeding required at the preliminary hearing. At the preliminary hearing, which the Fourth Amendment does not require, the court determines whether the Commonwealth has met its burden of offering prima facie evidence of **each** element of **each** charged crime. It is the admissible evidence of guilt -- not the quantum of information known to police at point of arrest -- that is at issue at the preliminary hearing.

(Continued)

prosecutorial harassment has been alleged.

Id. at 229.

Pennsylvania cases, including the most recent on the question, have consistently recognized the nature of the prima facie standard, which is far different than a Fourth Amendment probable cause determination:

> The Commonwealth establishes a *prima facie* case when it produces evidence that, if accepted as true, would warrant the trial judge to allow the case to go to a jury. The Commonwealth need not prove the elements of the crime beyond a reasonable doubt; rather, the *prima facie* standard requires evidence of the existence of each and every element of the crime charged. . . .
>
> Instantly, in order to allow the case to go to the jury the Commonwealth was required to show probable cause that Appellee (1) attempted to cause or intentionally or knowingly caused (2) bodily injury (3) to a police officer (4) in the performance of his duties.

Commonwealth v. Marti, 779 A.2d 1177, 1179 (Pa. Super. 2001) (citations omitted). *Accord Commonwealth ex rel. Buchanan v. Verbonitz*, 581 A.2d 172, 174 (Pa. 1990) (to satisfy burden of establishing a prima facie case, "the Commonwealth must produce legally competent evidence which demonstrates the existence of each of the material elements of the crime charged and legally competent evidence to demonstrate the existence of facts which connect the accused to the crime charged"), *cert. denied*, 111 S. Ct. 1108 (1991); *Commonwealth v. McBride*, 595 A.2d 589, 591 (Pa. 1991) (to establish a prima facie case, the Commonwealth "is required to present evidence with regard to each of the material elements of the charge and to establish sufficient

probable cause to warrant the belief that the accused committed the offense").[5]

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[5] Although the *McBride* court, like *Marti*, used the term "probable cause" in the course of describing a prima facie case, it is clear from the entire opinion that the court's holding had nothing to do with Fourth Amendment probable cause. Rather, the issue in *McBride* was whether the Commonwealth had made a prima facie showing of one element of the crime of criminal trespass. *McBride*, 595 A.2d at 591-92. In fact, this Court has recognized that the terms are sometimes used interchangeably, without becoming equivalent for Fourth Amendment purposes. The standard of proof required at the preliminary hearing "is usually referred to as 'probable cause,' but in some jurisdictions it may approach a prima facie case of guilt." *Gerstein v. Pugh*, 420 U.S. at 119.

Petitioner cites to *Commonwealth v. Sebek*, 716 A.2d 1266, 1269 (Pa. Super. 1998), for the proposition that "a finding by a magistrate that the Commonwealth did not establish probable cause that the appellant committed the violations for which he was charged is the same as a finding that the Commonwealth did not establish a prima facie case." By his quotation of the words "magistrate" and "probable cause," petitioner apparently hopes to create the impression that the proceeding in question was a *Gerstein* Fourth Amendment determination. In reality, the magistrate in *Sebek* had presided over a *preliminary hearing*. The Superior Court accordingly held that there is "no legal distinction to the choice of phraseology that the magistrate may have employed in dismissing the charges." This holding defeats rather than demonstrates petitioner's assertion that "probable cause," as used in relation to Pennsylvania preliminary hearings, means probable cause as used in the Fourth Amendment.

In application of this heightened prima facie standard, Pennsylvania charges are subject to preliminary hearing dismissal on a wide variety of grounds that would be entirely unavailable in a Fourth Amendment probable cause determination. *E.g.*, *Commonwealth v. Carmody*, 2002 W.L. 987989 *4 (Pa. Super. 5/15/02) (reviewing claim that preliminary hearing court erroneously relied on victim's prior inconsistent statement to find prima facie case); *Commonwealth v. Moyer*, 648 A.2d 42, 46-47 (Pa. Super. 1994) (Commonwealth failed to establish, *inter alia*, causation to support homicide charge, but evidence did support lesser offense); *Commonwealth v. Neckerauer*, 617 A.2d 1281, 1288-89 (Pa. Super. 1992) (no evidence of agreement presented to support conspiracy charge, although other charges were supported); *Commonwealth ex rel. Buchanan v. Verbonitz*, 581 A.2d at 174-75 (prima facie case not established where Commonwealth relied solely on hearsay and accused denied right of confrontation); *Commonwealth v. Davis*, 454 A.2d 92, 96 (Pa. Super. 1982) (preliminary hearing court may not consider defendant's confession unless Commonwealth first establishes corpus delicti).

Thus, under Pennsylvania law, the prima facie inquiry that occurs at the preliminary hearing involves a detailed analysis of the evidence, filtered by trial-like rules of admissibility, and measured against the statutory elements of each crime charged. The quality and quantity of evidence that would be sufficient to permit a judge to submit a case to the jury is obviously far greater than that necessary to permit a Fourth Amendment probable cause determination. The Court of Appeals held correctly that "there is nothing inherently inconsistent between the failure of the Commonwealth to establish a *prima facie* case at the preliminary hearing and the

existence of probable cause for a second arrest." 275 F.3d at 230.[6]

Petitioner's contrary argument is the epitome of empty formalism. He maintains that, because some Pennsylvania cases have used the terms "probable cause" and "prima facie" interchangeably, the phrases must be given identical meaning for Fourth Amendment purposes. It is as if they are magic words that, once uttered, have automatic and even unintended consequences, regardless of the actual context in which they are used. In fact, however, the bases for dismissal at a preliminary hearing -- the unavailability of a witness, for example; the denial of confrontation; the misuse of prior statements; the absence of a corpus for a confession -- are simply unknown in Fourth Amendment jurisprudence. Conversely, the threshold for Fourth Amendment analysis -- detention -- is irrelevant for preliminary hearings; in the absence of a prima facie case, the charges must be dismissed, whatever the defendant's custody status may be.

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[6] Petitioner complains that no new evidence was presented at his second preliminary hearing as compared to the first. He attacks the Court of Appeals for its observation that, in some cases, there will be new evidence. But his argument is a straw man. The existence of new evidence, or of old evidence that was not presented at the original preliminary hearing (which, after all, is not supposed to be a full trial), may certainly provide one motivation for a rearrest after the dismissal of charges at a preliminary hearing. But such additional evidence is not required by any Fourth Amendment principle -- unless, of course, the prima facie standard is falsely equated with probable cause, *see* discussion *supra*, and the prima facie determination is then accorded preclusive effect, *see* discussion *infra*.

In apparent acknowledgment of the problem, petitioner insists that equivalence between probable cause and preliminary hearings is immaterial to his position; he must prevail, says petitioner, even if the standard for establishing a prima facie case is indeed greater than that for probable cause. But this argument quickly collapses, because it turns out to be no more than an assertion that probable cause determinations really *are* the same as preliminary hearings: they have the same general purpose (protecting liberty), and they use the same words (sometimes). Constitutional analysis, however, is not so mechanical. The reality is that Pennsylvania has chosen to provide two levels of protection to defendants before trial: the probable cause determination required by *Gerstein*, and the prima facie determination required by long-established state practice. The states are free to create procedures that are not transmogrified into federal constitutional rights.

Finally, petitioner's claim would be unworthy even if the Court of Appeals had been wrong about the distinct status of preliminary hearing dismissals as a matter of Pennsylvania law. Petitioner's argument that the Commonwealth must seek judicial approval prior to rearrest necessarily elevates the interlocutory dismissal of charges at a preliminary hearing to the level of binding judicial precedent constituting a collateral estoppel or res judicata bar that governs any future arrest. Petitioner proffers a pro forma disavowal of such a collateral estoppel notion; but his position is nonsensical without it. In petitioner's world, what standard would a magistrate apply in reviewing a rearrest request? Probable cause, presumably -- but if a judge has already dismissed the charges at a preliminary hearing, and if such a dismissal equals a finding that no probable cause exists, then by what authority can a second judicial officer rule otherwise? Could the magistrate simply disregard the (now-to-be-imputed)

probable cause determination of the preliminary hearing judge? Must a higher court be consulted?

Petitioner cannot answer such questions. They arise precisely because of the preclusive effect that he must accord to his preliminary-hearing-dismissal-cum-probable-cause-determinations. Yet the certiorari petition is bereft of any authority discerning such a bar within either Fourth Amendment or Pennsylvania precedent. To the contrary, federal and state law reject the idea. *Ocampo v. United States*, 34 S. Ct. 91, 100 (1914) ("A finding that there is no probable cause is not equivalent to acquittal, but only entitles the accused to his liberty for the present, leaving him subject to rearrest"); *In re Riggins*, 254 A.2d 616, 617 (Pa. 1969) ("when the Commonwealth believes that a defendant has been improperly discharged by a committing magistrate its remedy is to have the defendant re-arrested and taken before another magistrate"); *see Commonwealth v. Waller*, 682 A.2d 1292, 1294 (Pa. Super. 1996) (dismissal of charges at preliminary hearing due to failure to establish a prima facie case is an interlocutory decision that cannot be appealed).

As the Court of Appeals correctly found, a preliminary hearing dismissal in Pennsylvania does not undo an earlier probable cause determination under the Fourth Amendment, and has no collateral estoppel effect. The petition for certiorari should be denied.

CONCLUSION

For these reasons, the Commonwealth respectfully requests this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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